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In the Supreme Court of the United States

OCTOBER TERM, 1994

THE BUCKEYE UNION INSURANCE COMPANY,
PETITIONER,

v.

EUGENE A. LEBER, RICHARD P. LEBER,
AND JUNE M. LEBER, RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court of Ohio violated the Due Process Clause of the Fourteenth Amendment when it reinstated a $23,000,000 judgment against petitioner without affording petitioner any appellate review of its legal claims, where (a) Ohio law expressly provides parties with an appeal as of right and (b) respondents were afforded appellate review of their claims.

RULE 29.1 STATEMENT

Petitioner Buckeye Union Insurance Company states that its parent company is Continental Corporation and that its only subsidiary, other than wholly-owned subsidiaries, is First Insurance Company of Hawaii, Ltd.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	11
I. THE DECISION BELOW VIOLATES THE DUE PROCESS CLAUSE BY CUTTING OFF ANY APPELLATE REVIEW OF PETITIONER'S LEGAL CLAIMS, EVEN THOUGH STATE LAW EXPRESSLY PROVIDES AN APPEAL AS OF RIGHT FOR ALL PARTIES ON QUESTIONS OF LAW	12
II. THE COURT SHOULD SUMMARILY REVERSE OR VACATE THE DECISION BELOW AND REMAND FOR THE STATE COURTS TO CONSIDER AND DETERMINE PETITIONER'S DISREGARDED LEGAL CLAIMS	19
CONCLUSION	21

TABLE OF AUTHORITIES

Pages

Cases

Allison v. *United States*, 386 U.S. 13 (1967) 19

Amsdell v. *Cuyahoga County Bd. of Revision*, 69 Ohio St. 3d 572, 635 N.E.2d 11 (1994) 13

Boddie v. *Connecticut*, 410 U.S. 371 (1971) 18

Brinkerhoff-Faris Trust Co. v. *Hill*, 281 U.S. 673 (1930) 11, 14-17

Burns v. *Ohio*, 360 U.S. 252 (1959) 18

Capital Cities Media, Inc. v. *Toole*, 466 U.S. 378 (1984) 20

Criss v. *Springfield Twp.*, 43 Ohio St. 3d 83, 538 N.E.2d 406 (1989) 7

Cruz v. *Beto*, 405 U.S. 319 (1972) 19

Dougherty v. *Torrence*, 10 Ohio St. 3d 139 (1984) 13

Eaton v. *City of Tulsa*, 415 U.S. 697 (1974) 19

Engle v. *Isaac*, 456 U.S. 107 (1982) 14

Flower v. *United States*, 407 U.S. 197 (1972) 19

TABLE OF AUTHORITIES - Continued

Pages

Griffin v. *Illinois*, 351 U.S. 12 (1956) 18

Joint Anti-Fascist Comm. v. *McGrath*, 341 U.S. 123 (1951) 20

Kraly v. *Vannewkirk*, 69 Ohio St. 3d 627, 635 N.E.2d 323 (1994) 13

Lassiter v. *Department of Social Services*, 452 U.S. 18 (1981) 11, 18

Leber v. *Smith*, 773 F.2d 101 (6th Cir. 1985), cert. denied, 475 U.S. 1084 (1986) 4

Liddell v. *SCA Services of Ohio, Inc.*, 70 Ohio St. 3d 6, 635 N.E.2d 1233 (1994) 13

Lindsey v. *Normet*, 405 U.S. 56 (1972) 13

Nolan v. *Nolan*, 11 Ohio St. 3d 1, 462 N.E.2d 410 (1984) 13

Palko v. *Connecticut*, 302 U.S. 319 (1937) 12

Reich v. *Collins*, 115 S. Ct. 547 (1994) 17

Saunders v. *Shaw*, 244 U.S. 317 (1917) 16, 17, 20

State ex rel. Carter v. *Schotten*, 70 Ohio St. 3d 89, 637 N.E.2d 306 (1994) 13

TABLE OF AUTHORITIES - Continued

Pages

State ex rel. Hipp v. *City of North Canton*, 70 Ohio St. 3d 102, 637 N.E.2d 317 (1994) 13

State v. *Ripple*, 70 Ohio St. 3d 86, 637 N.E.2d 304 (1994) 13

State v. *Shindler*, 70 Ohio St. 3d 54, 636 N.E.2d 319 (1994) 13

Taylor v. *McKeithen*, 407 U.S. 191 (1972) 19

Thackery v. *Helfrich*, 123 Ohio St. 334, 175 N.E. 449 (1931) 14

United States v. *Benmar Transport & Leasing Co.*, 444 U.S. 4 (1979) 19

Winslow v. *Ohio Bus Line Co.*, 148 Ohio St. 101, 73 N.E.2d 504 (1947) 14

Wolff v. *McDonnell*, 418 U.S. 539 (1974) 17

Zinermon v. *Burch*, 494 U.S. 113 (1990) 17

Statutes

28 U.S.C. § 1257(a) 2

42 U.S.C. § 1983 3

Ohio Const., art. IV, § 1 3

TABLE OF AUTHORITIES - Continued

Pages

Ohio Const., art. IV, § 3 . . . . . 3, 12

Ohio App. R. 12(A) 7

Ohio Rev. Code § 2501.01 3

Ohio Rev. Code § 2501.02 12

Ohio S. Ct. Rep. R. 1(B) 14

Miscellaneous

R. Stern, E. Gressman, S. Shapiro & K. Geller, SUPREME COURT PRACTICE (7th ed. 1993) 11

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Buckeye Union Insurance Company, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio (App., *infra*, 1a-19a) is reported at 70 Ohio St. 3d 548, 639 N.E.2d 1159 (1994). The previous opinions of the Erie County Court of Appeals both on remand (App., *infra*, 27a-31a) and reversing the judgment of the trial court (*id.* at 34a-62a) are unreported.

The judgment entry of the Erie County Court of Common Pleas on the original jury verdict (*id.* at 63a-65a) is unreported.

JURISDICTION

The Ohio Supreme Court issued an opinion in this case on October 19, 1994. A timely motion for reconsideration was denied on December 7, 1994. *See* App., *infra*, 20a. On March 1, 1995, Justice Stevens entered an order extending the time to file a petition for a writ of certiorari to and including March 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law * * * ."

STATEMENT

Petitioner comes before this Court bearing the severe burden of an adverse judgment amounting to more than *$23,000,000*. Were this judgment the result of fair and regular judicial processes that had been applied evenhandedly to all parties, the case would present no basis for this Court's review. But this staggering judgment is instead the result of an aberrational process of appellate review that on its face violates basic principles of the Due Process Clause. The courts of Ohio have acted to cut off any appellate review of petitioner's substantial legal claims, despite the fact that Ohio law expressly grants all parties an appeal as of right from a trial court judgment on questions of law and despite the fact that respondents were afforded full appellate review of their claims.

Consistent with the current composition of the federal judiciary and many state judicial systems, the State of Ohio

generally provides litigants with three levels of courts: the initial trial courts, the intermediate appeals courts, and one supreme court. In Ohio, these courts are designated respectively as the Court of Common Pleas, the Court of Appeals, and the Supreme Court. See Ohio Const., art. IV, § 1. Although the appellate jurisdiction of the Ohio Supreme Court has come to be largely discretionary, every party has a right, following a final judgment or order rendered by the Court of Common Pleas, to an appeal "upon questions of law," and to a determination of those issues, by the intermediate Court of Appeals. Ohio Rev. Code § 2501.01; see Ohio Const., art. IV, § 3.

The State of Ohio established this court system to provide uniform justice to all civil litigants. In this case, however, either through oversight or clear error, petitioner has had a number of its distinct and substantial legal claims extinguished without any appellate review whatsoever. To compound the problem, although the Ohio appellate courts deprived petitioner of all review of its legal claims, both the Court of Appeals and the Ohio Supreme Court granted review and determined the legal claims of respondents. In both respects, these proceedings violated the Due Process Clause of the Fourteenth Amendment. Petitioner thus respectfully submits that the decision below should be summarily reversed or vacated, and the case remanded to allow appellate resolution of petitioner's legal challenges to the $23,000,000 judgment.

1. *The Events Leading Up To This Case.* On April 7, 1979, respondent Eugene A. Leber was accidently shot by an Erie County Deputy Sheriff and was seriously injured. He and his parents first sued the Deputy Sheriff, the Erie County Sheriff, and the Board of Erie County Commissioners in federal court under 42 U.S.C. § 1983, but their suit was

unsuccessful;[1] they thereafter brought suit against the same defendants in state court. The County Sheriff's Department was insured by American Home Assurance Company, which assigned the law firm of Eastman & Smith to represent its insured; the Board of Commissioners was insured by petitioner, which assigned Raymond N. Watts to represent its insured. The Lebers' state court suit, grounded upon negligence claims, resulted in a jury verdict against the Sheriff and Deputy Sheriff in the amount of $10,150,000. The jury found no negligence on the part of the Board of Commissioners. See App., *infra*, 2a-3a.

The Court of Common Pleas ruled that the Board of Commissioners was liable for the judgment against the Sheriff and Deputy Sheriff on the ground of *respondeat superior*, an issue that was contested by all the defendants. The Board appealed from the trial court judgment on this issue. Although the trial judge had stated that the jury's verdict was vastly excessive and that he intended to order either a new trial or a remittitur to $3,250,000, the Court of Appeals rescinded his jurisdiction before he could enter any such order. While the appeal was pending, the named defendants settled their claims with the Lebers *over the objection of petitioner*, and the appeal was dismissed without a decision. App., *infra*, 37a. The Board agreed to pay the Lebers *$2,000,000 in final satisfaction of all liability on the part of the defendants*, and the named defendants agreed to assign to the Lebers any rights that the named defendants might have against their insurance carriers or their attorneys. *Ibid.* Neither insurer consented to or was a party to this unusual agreement. *Ibid.*

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[1] The federal lawsuit was resolved against respondents on a motion for summary judgment, and this resolution was affirmed on appeal. See *Leber* v. *Smith*, 773 F.2d 101 (6th Cir. 1985), cert. denied, 475 U.S. 1084 (1986).

2. *The Trial Proceedings In This Case.* Respondents Eugene A. Leber and his parents then filed this lawsuit, which was eventually consolidated against four defendants: American Home Assurance Company, the insurance carrier for the County Sheriff's Department; Eastman & Smith, the law firm that American Home had assigned to represent all of the defendants in the previous case; petitioner, the insurance carrier for the Board of Commissioners; and Raymond N. Watts, the attorney whom petitioner had assigned to represent the Board in the previous case. App., *infra*, 37a. Respondents, pursuing their assigned claims, asserted that the four defendants acted in bad faith by failing to settle the previous case on behalf of the insureds within the policy limits. During the trial, respondents settled their claim against American Home, the insurer for the County Sheriff's Department — which alone had been found liable in the previous case — in exchange for $2,000,000. *Id.* at 38a.

Nonetheless, the trial court ruled that petitioner, which had separately insured the Board of Commissioners, was *also* an insurer for the County Sheriff's Department, a point that petitioner had vigorously contested as inconsistent with the express terms of the policy and the intent and understanding of the parties. App., *infra*, 38a-39a. Petitioner's limit on insurance coverage for the Board of Commissioners, as set forth in the policy, was $1,000,000 per occurrence; yet the trial court also ruled that $2,000,000 in coverage was available under petitioner's policy. *Ibid.* In the end, the jury returned a verdict against petitioner on respondents' bad faith claim, and returned verdicts in favor of the attorney defendants. The trial court then entered judgment for respondents, against petitioner, for $13,336,232.80.[2] This amount, which was well in excess *both* of the policy limits for petitioner's insured *and* of the settlement figure for the

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[2] With post-judgment interest, this amount had increased to more than $23,000,000 by the time of the decision that is the subject of this petition.

previous lawsuit, was derived by taking the $10,150,000 face amount of the original trial judgment in the previous case, plus accumulated interest, and subtracting an offset in the amount of respondents' settlement with American Home. *Id.* at 40a.

3. *The Appellate Proceedings In This Case.* Petitioner appealed this judgment to the Erie County Court of Appeals, raising numerous distinct assignments of error. The questions of law that petitioner contested on appeal included the following points of principal significance:

- Petitioner's insurance policy expressly provided coverage only to the Board of County Commissioners, and did not provide coverage to the County Sheriff's Department.

- Any recovery by the insured in a subsequent suit for alleged bad faith failure to settle a prior suit is limited to the actual damages to the insured, and thus where the prior suit was settled by the insured, the actual damages cannot exceed the settlement amount plus any reasonable expenses incurred to defend the suit.

- Petitioner's insurance policy vested control of defense and settlement of the previous suit in petitioner, as the insurer; hence, the settlement between the insured and respondents in the previous suit, which was reached without petitioner's consent, breached the insured's obligation of cooperation under the policy and forfeited its rights or claims against petitioner under the policy.

See App., *infra*, 40a-43a. Petitioner's assignments of error in the Court of Appeals raised several other substantial questions of law as well. See *ibid.*

The Court of Appeals reversed the judgment of the Court of Common Pleas on the first of these issues, and did not

continue on to consider or determine the remaining questions of law raised by petitioner. As the Court of Appeals put the matter: "This court has effectively ruled in favor of [petitioner]. As such, [petitioner's remaining assignments of error] are rendered moot, and found not well-taken." App., *infra*, 50a. The Court of Appeals thus held only that the Erie County Sheriff's Department was not an insured under the terms of petitioner's policy, and accordingly petitioner could not be held liable on a bad faith claim. All of respondents' legal claims, which were raised on cross-appeal, were considered and rejected on the merits, and the trial court judgments in favor of the remaining defendants were also upheld. *Id.* at 50a-60a. The Court of Appeals therefore directed the trial court to enter judgment for petitioner. *Id.* at 60a.

Respondents appealed this ruling to the Ohio Supreme Court, which initially accepted jurisdiction of the case. Petitioner moved for a remand to the Court of Appeals, however, noting that under Ohio Appellate Rule 12(A), as in effect at that time, the Court of Appeals was obliged in disposing of the case to consider and determine each and every one of the questions of law that petitioner had raised on appeal, including the substantial legal claims set forth above. See Ohio App. R. 12(A) [version in effect before subsequent amendment on July 1, 1992] ("All errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision as to each such error."); *Criss* v. *Springfield Twp.*, 43 Ohio St. 3d 83, 538 N.E.2d 406 (1989) (a court of appeals may not treat assignments of error as "moot" or "irrelevant" after deciding to reverse a case on another issue). The Ohio Supreme Court granted petitioner's motion and remanded the case for the Court of Appeals to determine the merits of the other assignments of error that petitioner had raised on appeal and that the Court of Appeals had thus far declined to decide. App., *infra*, 32a.

On remand, however, in an opinion issued in August 1992, the Court of Appeals merely reaffirmed its previous decision and again declined on mootness grounds to decide the merits of the other questions of law raised by petitioner. App., *infra*, 27a-31a. It was able to repeat its earlier disposition because an intervening amendment to Ohio Appellate Rule 12(A) explicitly authorized reviewing courts for the first time to exercise discretion about whether to determine some or all of the claims raised by an appealing party in giving judgment for that party. See Ohio App. R. 12(A) (court of appeals shall "decide each assignment of error and give reasons in writing for its decision" unless "an assignment of error is made moot by a ruling on another assignment of error"). The Court of Appeals therefore again decided on the merits only the issues that it had resolved previously, seeing no need to determine the merits of petitioner's remaining substantial legal claims.

Respondents again sought review by the Ohio Supreme Court, claiming that it had retained jurisdiction to decide the merits of respondents' appeal. The court disagreed, and denied further review in December 1992. App., *infra*, 25a. On three occasions, in January, February, and March 1993, the Supreme Court denied respondents' motions for reconsideration of its ruling declining jurisdiction. *Id.* at 24a. The case appeared to be closed.

Meanwhile, on January 26, 1993, the Court of Appeals denied an unrelated motion filed by attorney Watts — who had prevailed at trial and on appeal — requesting a ruling on Watts's other assignments of error, which the court had found unnecessary to reach. App., *infra*, 22a-23a. Respondents filed another notice of appeal to the Ohio Supreme Court from this ruling, despite the fact that the ruling was precisely what they had requested and indeed had no adverse effect on them. Although the January 26 order was the only ruling from which the appeal was taken, respondents seized on this ruling as another potential vehicle to obtain further review of

their case against petitioner. Petitioner opposed jurisdiction on the grounds that respondents lacked standing to appeal from a decision rendered in their favor and involving only Watts and that respondents could not again seek to reopen their case against petitioner, which had been finally resolved by the Ohio Supreme Court's previous orders.

4. *The Ohio Supreme Court's Unexpected Disposition.* Contrary to established state rules of finality, in June 1993 the Ohio Supreme Court granted review of respondents' claims against *petitioner* (App., *infra*, 21a), which had been disposed of adversely to respondents in the Court of Appeals' decision in August 1992. In its eventual opinion, the Ohio Supreme Court said not a word about the issue of Watts's other, unaddressed defenses, which had been the *sole* question before the Court of Appeals in the decision from which review was granted. Instead, the Ohio Supreme Court considered only the underlying liability questions that appeared to have been finally resolved, at the latest, with that court's third denial of reconsideration in March 1993.

The Ohio Supreme Court held that petitioner's policy extended coverage not only to the Board of County Commissioners, but also to the County Sheriff's Department, and thus reversed the Court of Appeals' decision on this point. In addition, the Ohio Supreme Court rejected respondents' claims against Watts. Without further ado, the Ohio Supreme Court then *reinstated the trial court's judgment against petitioner and in favor of respondents*. App., *infra*, 9a.

In reaching this extraordinary result, the Ohio Supreme Court did not purport to consider or determine any of petitioner's substantial legal claims that had never been decided on the merits by the Court of Appeals. Indeed, the court's decision is explicit on this point, for the substance of the opinion is divided into separate sections, each headed by Roman numerals, that expressly address only respondents'

legal claims. The first section is captioned as "The Claims Against Buckeye Union," and the second section is captioned as "The Claims Against Watts." App., *infra*, 6a-8a. The third section briefly states the final disposition of the case, which was to "reinstate all of the trial court's judgments" and specifically to direct that "[t]he findings of the jury should not be disturbed." *Id.* at 9a. The Ohio Supreme Court did not remand the case for further proceedings on petitioner's remaining legal claims, but simply reversed outright, cutting off all access to further appellate review. *Ibid.*

Whether through inadvertence or clear error, therefore, the tortuous proceedings in this case have created an unexpected situation in which petitioner has been utterly deprived of the right of appeal, which Ohio law provides to all parties, on a number of its substantial questions of law. As a result, respondents received appellate review and a favorable ruling on their legal claims, whereas petitioner's remaining substantial legal claims have never received any consideration or determination on the merits from any appellate court. The two dissenting justices stated their disagreement with the majority's treatment of respondents' claims and also commented, without elaboration, that "[w]e have deprived Buckeye Union of due process of law in this matter." App., *infra*, 19a.

In a timely motion for reconsideration, petitioner addressed the unexpected and unfair consequences of the Ohio Supreme Court's disposition of the case. In particular, petitioner directly raised the claim that the Ohio Supreme Court's decision itself had the effect of depriving petitioner of its constitutional right to due process of law. See Defendant-Appellee The Buckeye Union Insurance Company's Motion for Reconsideration at 3, 6 (citing, *inter alia*, *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673 (1930) (arbitrary departure from established procedures that deprives party of right to appellate review violates the Due Process Clause), and *Lassiter* v. *Department of Social Services*, 452

U.S. 18 (1981) (Due Process Clause is a guarantee of "fundamental fairness")). On December 7, 1994, the Ohio Supreme Court denied reconsideration without comment. App., *infra*, 20a.[3]

REASONS FOR GRANTING THE PETITION

This case presents an extreme example of an aberrant process of appellate review that has squarely violated fundamental tenets of the Due Process Clause. At stake is an enormous judgment against petitioner that is worth more than $23,000,000. Yet the Ohio Supreme Court's unexpected and unwarranted disposition of this case has served to cut off any appellate review of petitioner's substantial legal claims, despite the fact that Ohio law expressly grants every party a statutory appeal as of right and despite the fact that the Ohio courts have exercised their reviewing authority to determine respondents' legal claims. This untenable result is the product either of an egregious oversight or, more likely, an unfair, arbitrary, and erroneous departure from established procedures. Accordingly, petitioner respectfully submits that the decision below should be summarily reversed or vacated, and the case remanded to allow resolution of petitioner's substantial legal claims that have never received any appellate review whatsoever.

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[3] This Court has held that a federal question is timely raised in a petition for rehearing in the highest state court, even when rehearing is summarily denied, if, as here, the federal question is created by an unexpected decision of the court below. See R. Stern, E. Gressman, S. Shapiro & K. Geller, SUPREME COURT PRACTICE 129 (7th ed. 1993).

I. THE DECISION BELOW VIOLATES THE DUE PROCESS CLAUSE BY CUTTING OFF ANY APPELLATE REVIEW OF PETITIONER'S LEGAL CLAIMS, EVEN THOUGH STATE LAW EXPRESSLY PROVIDES AN APPEAL AS OF RIGHT FOR ALL PARTIES ON QUESTIONS OF LAW

Ohio law provides every party to a lawsuit with a right of appeal from a trial court judgment to the Court of Appeals on questions of law. See Ohio Rev. Code § 2501.02; Ohio Const., art. IV, § 3. The Ohio Supreme Court has deprived petitioner of that right in this case, for reasons that are unexplained and inexplicable. The upshot is that petitioner has been forced to pay a judgment of more than $23,000,000, even though that judgment is very likely infected by one or more material legal errors that would be corrected by an appellate court.[4] This result plainly violates the most fundamental dictate of due process: the right to be heard "must be a real one, not a sham or a pretense." *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937).

There can be no question that the bizarre disposition below has extinguished petitioner's appeal as of right on a number of its substantial legal claims. The Ohio Supreme Court's mandate plainly was to "reinstate all of the trial court's judgments," and the court specifically directed that

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[4] For example, it is hard to imagine that an appellate court that considered the question would reject petitioner's contention that an insured that settled for $2,000,000 a claim that the trial court had indicated it would remit to $3,250,000 and that was still subject to appeal could thereby have suffered a $10,150,000 injury. And it is equally hard to imagine that an appellate court that considered the question would find that petitioner acted in *bad faith* on the issue of insurance coverage, when five of the ten appellate judges in this case agreed with petitioner that the policy issued to the Board of County Commissioners did not in fact extend coverage to the County Sheriff's Department.

"[t]he findings of the jury should not be disturbed." App., *infra*, 9a. The Ohio Supreme Court did not provide for a remand in this case, which would have allowed the Court of Appeals to resolve petitioner's remaining legal claims, as the Supreme Court ordinarily does in other such cases.[5] Thus, no further appellate review is permitted, even though petitioner has raised several legal questions that have not been considered or decided on the merits by any appellate court.[6]

It is equally indisputable that petitioner has never received any consideration or determination of a number of substantial questions of law that it raised in its appeal as of right to the Erie County Court of Appeals. At an earlier stage of these proceedings, the Ohio Supreme Court expressly remanded this case for the Court of Appeals to determine those claims on the merits under the then-existing provisions of Ohio Appellate Rule 12(A), which required the Court of Appeals to decide each and every legal claim raised by petitioner. See App., *infra*, 32a. On remand, however, the Court of Appeals availed itself of new amendments to Rule 12(A), which afforded it discretion in this regard. Accordingly, the Court of Appeals once again declined to rule on the merits of petitioner's remaining legal claims "in view

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[5] See, *e.g.*, *State ex rel. Hipp* v. *City of North Canton*, 70 Ohio St. 3d 102, 637 N.E.2d 317 (1994); *State ex rel. Carter* v. *Schotten*, 70 Ohio St. 3d 89, 637 N.E.2d 306 (1994); *State* v. *Ripple*, 70 Ohio St. 3d 86, 637 N.E.2d 304 (1994); *State* v. *Shindler*, 70 Ohio St. 3d 54, 636 N.E.2d 319 (1994); *Liddell* v. *SCA Services of Ohio, Inc.*, 70 Ohio St. 3d 6, 635 N.E.2d 1233 (1994); *Kraly* v. *Vannewkirk*, 69 Ohio St. 3d 627, 635 N.E.2d 323 (1994); *Amsdell* v. *Cuyahoga County Bd. of Revision*, 69 Ohio St. 3d 572, 635 N.E.2d 11 (1994).

[6] It is plain under Ohio law, as under federal law, that "an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case." *Nolan* v. *Nolan*, 11 Ohio St. 3d 1, 5, 462 N.E.2d 410, 411 (1984); see also *Dougherty* v. *Torrence*, 10 Ohio St. 3d 139, 141 (1984) (same).

of this court's decision regarding other substantive assignments of error." *Id.* at 30a.

This was perfectly sensible in light of the disposition being made by the Court of Appeals. But when the Ohio Supreme Court proceeded to reverse the Court of Appeals' decision and to reinstate the trial court's judgment based on its consideration of *respondents'* claims alone, petitioner became the victim of a judicial shell game. At that point, the Ohio Supreme Court was required to remand the case to the Court of Appeals to consider petitioner's thus far unreviewed contentions.[7]

The effect of the proceedings below, therefore, has been arbitrarily to cut off petitioner's appeal as of right on its remaining, properly presented legal claims. Under this Court's settled precedents, this unexpected result violates the Due Process Clause.

In *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673 (1930), for example, the Missouri Supreme Court denied relief to a taxpayer corporation on the ground that the taxpayer had failed to pursue an administrative remedy before

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[7] Under Ohio law, the Ohio Supreme Court itself could not properly have considered and determined petitioner's other questions of law at this juncture, for it "may not pass upon any question unless the record certified to this court by the Court of Appeals discloses that such question was presented to and passed upon by that court." *Winslow* v. *Ohio Bus Line Co.*, 148 Ohio St. 101, 73 N.E.2d 504 (1947), syllabus ¶ 5. The Ohio Supreme Court's disposition in *Winslow*, in fact, was to remand the case for further proceedings: "As the record in this case does not disclose that all errors assigned by the appellant in the Court of Appeals were passed upon by th[at] court, we are of the opinion that the cause should be remanded to the Court of Appeals to pass upon any undecided assignment[s] of error, if any there be." *Id.* at 118, 73 N.E.2d at 513. See also note 5, *supra* (citing other cases). As this Court has noted, "[i]n Ohio, the court's syllabus contains the controlling law." *Engle* v. *Isaac*, 456 U.S. 107, 111 n.3 (1982). See Ohio S. Ct. Rep. R. 1(B); see also, *e.g.*, *Thackery* v. *Helfrich*, 123 Ohio St. 334, 175 N.E. 449 (1931).

the State Tax Commission. In reaching this result, the Missouri Supreme Court overruled a consistent line of its own prior decisions that had held it unnecessary to pursue the same administrative remedy. At the time of the court's new ruling, it was too late for the taxpayer to pursue the administrative remedy in the case at hand. On petition for rehearing, the taxpayer contended that this unexpected disposition had deprived him of due process of law, a claim that the Missouri Supreme Court rejected without comment. See *id.* at 674-78.

This Court granted certiorari and reversed, holding that the proceedings below had deprived the taxpayer of "due process of law — using that term in its primary sense of an opportunity to be heard and to defend its substantive right." 281 U.S. at 678. The Court stated, first, that "the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense." *Ibid.* It also noted that no fault could be charged to the petitioning taxpayer, which "did not omit to comply with any existing condition precedent." *Id.* at 679. The same is true, of course, in this case: here petitioner complied with every existing condition precedent, yet the Ohio Supreme Court disposed of the case without allowing any appellate review or determination of a number of petitioner's legal claims. As in *Brinkerhoff-Faris*, the practical effect of the judgment below is to deprive petitioner of property "without affording it at any time an opportunity to be heard" on the merits of those questions of law that it had properly raised on appeal. *Id.* at 678.

The Court in *Brinkerhoff-Faris* went on to conclude that the unusual proceedings in that case did not accord the taxpayer with due process "in its primary sense" of "an opportunity to present its case and be heard in its support." 281 U.S. at 681. As the Court explained at greater length:

> If the judgment is permitted to stand, deprivation of [petitioner's] property is accomplished without its ever having had an opportunity to defend against the exaction. The state court refused to hear [petitioner's] complaint and denied it relief, not because of lack of power or because of any demerit in the [claim], but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available and which is not now open to it.

Id. at 679. Here, too, there is no satisfactory explanation for the Ohio Supreme Court's unexpected disposition of this case; petitioner's right to an appeal on a number of its potentially dispositive questions of law has been cut off "not because of lack or power or because of any demerit in the" claims, but because of an arbitrary departure from established procedures. If petitioner had known that the Ohio Supreme Court was going to change settled rules in the middle of the game, it would have mounted a far stronger argument for plenary review of all of its claims by the Court of Appeals. Instead, it acquiesced in that court's decision to follow amended Ohio Appellate Rule 12(A) on the understanding that the Ohio Supreme Court would follow its standard practices. See note 5, *supra*. The proceedings below have thus violated the Due Process Clause "in its primary sense," under the holding in *Brinkerhoff-Faris*. *Id.* at 681.

Similarly, in *Saunders* v. *Shaw*, 244 U.S. 317 (1917), the state trial court had excluded further evidence on a particular issue of fact because it considered the fact to be immaterial to the proper outcome of the case. The Louisiana Supreme Court took a different view of the matter, concluded that the issue was dispositive, and reversed the trial court's judgment on the basis of the evidence that had been included in the record on that issue of fact. The intervenor defendant appealed to this Court, contending that the ruling below deprived him of due process of law "because the case has been decided against him without his ever having had the

proper opportunity to present his evidence" on the factual issue found to be dispositive by the Louisiana Supreme Court. *Id.* at 319. Although this Court expressed some doubt about whether any further factfinding on the issue would actually change the result of the case, it reversed because "we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in." *Id.*

The *Saunders* decision is the precise analogue, with respect to questions of fact, to the due process issues raised in this case with respect to questions of law that have received no consideration and determination on the merits in the appellate courts. The complaining party in *Saunders* had been prevented by a peculiar conjunction of legal rulings from presenting his factual case on a dispositive issue and having it considered and determined on the merits by the state courts. In exactly the same fashion, the unusual proceedings in this case have barred petitioner from any appellate review or determination of a number of its substantial legal claims. In this case, likewise, an order granting remand to the courts below is necessary to "be sure that [petitioner's] rights are protected" and that petitioner is afforded "a chance to" receive the appellate review that is guaranteed as a matter of right to every party under Ohio law. *Saunders*, 244 U.S. at 319.

The constitutional violation in this case is a pointed example of the larger affront to the Due Process Clause that results whenever the government, including the judiciary, acts arbitrarily or departs arbitrarily from established procedures. See, *e.g.*, *Zinermon* v. *Burch*, 494 U.S. 113, 125 (1990); *Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974); see also *Brinkerhoff-Faris*, 281 U.S. at 680 ("The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government."). As the Court recently remarked in *Reich*

v. *Collins*, 115 S. Ct. 547, 550 (1994), under the Due Process Clause "a State may not * * * reconfigure its scheme, unfairly, in mid-course." Indeed, here, the unfairness of the proceedings below is particularly severe because the Ohio appellate courts "reconfigure[d]" the rules "in mid-course" so as to deny appellate review to petitioner while at the same time according full appellate review to respondents — who were permitted to appeal to the Ohio Court of Appeals and then to the Ohio Supreme Court to preserve their $23,000,000 windfall.

In *Griffin* v. *Illinois*, 351 U.S. 12 (1956), for example, the Court held that it violated both the Due Process Clause and the Equal Protection Clause for the State to "deny adequate appellate review" to one party "while granting such review to all others." *Id.* at 13. The Court acknowledged that under the Due Process Clause "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." *Id.* at 18. But the Court quickly added that "a State that does grant appellate review [cannot] do so in a way that discriminates" among parties arbitrarily and without adequate justification. *Ibid.* See also *Lindsey* v. *Normet*, 405 U.S. 56, 77 (1972) ("When an appeal is afforded, * * * it cannot be granted to some litigants and capriciously or arbitrarily denied to others * * *."). The same point applies with equal force to the effect of the unusual and grossly unfair proceedings in this case. See also *Boddie* v. *Connecticut*, 401 U.S. 371, 375-376 (1971); *Burns* v. *Ohio*, 360 U.S. 252, 258 (1959).

In sum, the decision of the court below — by departing arbitrarily in "mid-course" from settled procedures on which petitioner relied, by depriving petitioner of its right of appeal, and by simultaneously granting that right to its adversary — threatens the most basic guarantee of the Due Process Clause: "fundamental fairness." *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 24 (1981). To protect petitioner's federal rights, it would, as we next discuss, be entirely

appropriate for the Court to summarily reverse or vacate the judgment below and to remand the case to the state courts with instructions to consider and determine petitioner's substantial legal claims that have never been resolved on appeal.

II. THE COURT SHOULD SUMMARILY REVERSE OR VACATE THE DECISION BELOW AND REMAND FOR THE STATE COURTS TO CONSIDER AND DETERMINE PETITIONER'S DISREGARDED LEGAL CLAIMS

This Court has granted summary reversal or vacatur in many cases where it is palpably clear that constitutional violations have occurred. See, *e.g.*, *Eaton* v. *City of Tulsa*, 415 U.S. 697 (1974) (freedom of speech); *Flower* v. *United States*, 407 U.S. 197 (1972) (freedom of speech); *Cruz* v. *Beto*, 405 U.S. 319 (1972) (freedom of religion). In this case, it is beyond dispute that petitioner has raised substantial legal claims that have not been afforded any appellate review or determination, contrary to established procedures under state law. See, *e.g.*, note 4, *supra*. In the very same proceedings, the opposing parties were afforded plenary appellate review and determination of their legal claims. In these circumstances, as shown above, fundamental principles of the Due Process Clause have been plainly violated.

Petitioner accordingly requests that the Court summarily reverse or vacate the judgment below, and remand this case with instructions to consider petitioner's substantial legal claims that have never been addressed on appeal. The Court has granted such orders and allowed remands in previous cases where it appeared that patently erroneous procedural obstacles may have been imposed that would violate due process. See, *e.g.*, *United States* v. *Benmar Transport & Leasing Co.*, 444 U.S. 4 (1979) (summary reversal and remand in ICC case on basis of straightforward procedural error committed by court below); *Taylor* v. *McKeithen*, 407

U.S. 191 (1972) (summary vacatur and remand in reapportionment case where decision below lacked any explication of the reasons for its holding); *Allison* v. *United States*, 386 U.S. 13 (1967) (summary vacatur and remand where decision and record below created uncertainty about whether petitioner's right to counsel was violated).

This case cries out for the same relief, given (a) the clear and indefensible violation of the Due Process Clause, (b) the enormous magnitude of the property interest at stake (a $23,000,000 judgment), (c) the strong possibility that the judgment was erroneous, and (d) the truly minimal burden on this Court of ensuring compliance with "the deep-rooted demands of fair play enshrined in the Constitution." *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 123, 161 (1951). See also *Saunders*, 244 U.S. at 319 (Court remanded for further proceedings because it "cannot be sure that the defendant's rights are protected without giving him a chance" to present his claims properly for resolution on the merits).[8]

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[8] At a minimum, the case should be remanded to allow the Ohio Supreme Court to clarify its rationale for refusing to permit the Court of Appeals to pass on petitioner's remaining claims. See, *e.g.*, *Capital Cities Media, Inc.* v. *Toole*, 466 U.S. 378 (1984) (per curiam) (granting certiorari, vacating the judgment below, and remanding for such further proceedings as appropriate to clarify the record concerning petitioner's claims of federal constitutional right).

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the Ohio Supreme Court should be vacated, and the case should be remanded for the state courts to consider and determine petitioner's substantial legal claims that have not been afforded any appellate review.

Respectfully submitted.

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MARCH 1995

APPENDIX A

THE SUPREME COURT OF OHIO
1994 TERM

LEBER ET AL., APPELLANTS, V. SMITH ET AL., APPELLEES.

[Cite as *Leber v. Smith* (1994), 70 Ohio St.3d 548.]

Civil procedure—Civ. R. 51—Contesting improper jury instructions—Interpretation of insurance contract involves a question of law to be decided by a judge—Jury permitted to determine factual issues.

(No. 93-646—Submitted May 16, 1994—Decided October 19, 1994.)

Appeal from the Court of Appeals for Erie County, No. E-87-43.

This case involves two lawsuits. The first ("*Leber I*") was a personal injury suit brought against various officials of Erie County. The second ("*Leber II*") was a suit brought against insurance companies alleging, among other things, that the insurers had acted in bad faith when they defended the county officials in *Leber I*.

On April 7, 1979, plaintiff-appellant Eugene A. Leber was accidentally shot by Erie County Deputy Sheriff Steven A. Smith, defendant-appellee. The shooting occurred when Smith stopped a car driven by Leber. As he approached Leber's car with his firearm drawn, Deputy Smith slipped on a patch of ice. Smith accidentally discharged his weapon. Leber was struck by the shot and rendered a paraplegic.

In 1981, Leber and his parents, plaintiffs-appellants Richard P. and June M. Leber, filed suit in the United States District Court for the Northern District of Ohio, claiming a civil rights violation. The federal trial court granted summary judgment for the defendants, which was affirmed on appeal. *Leber v. Smith* (C.A.6, 1985), 773 F.2d 101.

Leber I, the personal injury action, was filed in the Erie County Court of Common Pleas in June 1983. Leber and his parents were plaintiffs in this action, while appellees Smith, the Sheriff of Erie County, the Board of Commissioners of Erie County ("the board") and its individual members were defendants.

At the time of the accident, the Sheriff's Department was insured by American Home Assurance Company ("American Home"). American Home assigned the law firm of Eastman & Smith to defend its insured.

At the time of the accident, the board was insured by Buckeye Union Insurance Company ("Buckeye Union"). Buckeye Union assigned attorney Raymond N. Watts, defendant-appellee, to defend its insured.

In an entry, the trial court in *Leber I* held that the board was liable under the doctrine of *respondeat superior* for any negligence of the Erie County Sheriff or his deputies that proximately caused injury to the Lebers.

Settlement negotiations began. The Lebers demanded $2,300,000 in full and final settlement of their claims against the county officials. The Lebers calculated this amount by adding $2 million of coverage allegedly available to the board under the Buckeye Union policy to the $300,000 of coverage allegedly available under the American Home policy. The board's position was that settlement of the case could not be discussed until Buckeye Union offered to participate and contribute to that amount. Buckeye Union, however, contended that there was no coverage in its policy for the Sheriff of Erie County or deputy sheriff and, therefore, made no settlement offer. An internal office memorandum, however, indicated that Buckeye Union analysts believed that Buckeye Union was liable under the terms of its policy.

Ultimately, *Leber I* was tried before a jury. The jury found thirty-five percent of the total negligence to be

attributable to Smith, sixty-five percent of the negligence to be attributable to the Erie County Sheriff and no negligence to be attributable to Eugene Leber.

Upon reviewing the jury's verdict in favor of the Lebers, the trial court ordered that "judgment is rendered in favor of plaintiffs and against defendants; that defendant Steven A. Smith shall pay plaintiff Eugene A. Leber the sum of three million five hundred four thousand dollars ($3,504,000.00); that defendant Erie County Sheriff (*i.e.*, the Erie County Sheriff's Department) shall pay to Eugene A. Leber the sum of six million four hundred ninety-six thousand dollars ($6,496,000.00); that defendant Steven A. Smith shall pay to Richard Leber and June Leber the sum of fifty-two thousand five hundred dollars ($52,500.00); and that defendant Erie County Sheriff * * * shall pay to Richard Leber and June Leber the sum of ninety-seven thousand five hundred dollars ($97,500.00).

"It is further the ORDER, JUDGMENT, and DECREE of this Court, in accordance with the approved judgment entry filed July 27, 1984, that Erie County, Ohio, by and through defendant Board of Erie County Commissioners, is liable for the entire judgment in the sum of ten million one hundred fifty thousand dollars ($10,150,000.00), plus all interest which may accrue thereon.

"* * * [I]nterest shall accrue at the rate of ten (10%) percent per annum from the date of the filing of this entry and * * * defendants shall pay all court costs incurred herein." (Footnote omitted.)

Before *Leber I* was reviewed on appeal, the Lebers settled their case with all three of the original defendants—Deputy Smith, the Sheriff of Erie County and the board. Pursuant to the agreement, the board agreed to pay the Lebers $2 million over a five-year period. The board, Deputy Smith and the Sheriff assigned all of their rights against their insurance carriers and attorneys to the Lebers.

The agreement required the Lebers to repay the board in the event they recovered money from the insurance carriers. All appeals of *Leber I* were then dismissed.

Following this settlement, the Lebers filed a complaint against American Home and the law firm of Eastman & Smith. The Lebers also intervened in the board's declaratory judgment action against Buckeye Union and were joined as party-plaintiffs. A motion to consolidate all three of these actions was granted on January 23, 1987. The Lebers became the principal plaintiffs in the consolidated action, and the defendants were Buckeye Union, American Home, Eastman & Smith and Raymond Watts.

With the claims of the board having been assigned to the Lebers in the settlement agreement, the Lebers now claimed that Buckeye Union had in bad faith failed to settle *Leber I* on behalf of its insured, the board, within the policy limits. Similar claims were made against American Home. The Lebers alleged that Eastman & Smith had committed legal malpractice, causing damage to the board. The Lebers also claimed that Raymond Watts breached the fiduciary duty owed to his client, the board.

Leber II proceeded to trial. During the trial, the Lebers agreed to dismiss their actions against American Home for $2 million.

On August 10, 1987, Judge McMonagle filed a judgment entry deciding the declaratory judgment action. The trial court found that "[f]or purposes of the insurance policy issued by the Buckeye Union Insurance Company * * *, the terms Board of Erie County Commissioners and Erie County are synonymous. Steven A. Smith is an employee of Erie County and the Board of Erie County Commissioners. Both Steven A. Smith and the Erie County Sheriff are insureds under the policy of insurance issued by the Buckeye Union Insurance Company." The trial court then declared that $2 million in coverage was available to the board.

The jury then returned a verdict in favor of the Lebers on their bad faith claim against Buckeye Union but also returned a verdict in favor of Watts and Eastman & Smith. The jury unanimously found that Buckeye Union's conduct "imported a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud or embracing actual intent to mislead or deceive another." Six of the eight jurors found that Buckeye Union's "conduct in failing to settle the [Lebers'] claims was motivated by actual malice." As a result of the verdict, the trial court entered a judgment for $13,336,232.80 in favor of the Lebers and against Buckeye Union. The amount of this judgment was calculated by adding the $10,150,000 judgment from *Leber I* to $3,064,465.74 in interest accumulating from the date that *Leber I* was decided and $2,121,767.06 in prejudgment interest accruing from July 5, 1982, to August 7, 1984. The trial court then subtracted from the judgment the $2 million settlement paid to the Lebers by American Home.

The Court of Appeals for Erie County reversed the judgment of the trial court. The appellate court found that Deputy Smith and the Erie County Sheriff's Department were not insureds under the Buckeye Union policy. The appellate court then upheld the trial court's judgment in favor of Watts and Eastman & Smith and against the Lebers.

The Supreme Court of Ohio remanded the cause to the Court of Appeals for Erie County to determine the merits of five assignments of error that the appellate court had determined to be moot and, thus, declined to decide. See 46 Ohio St.3d 702, 545 N.E.2d 1277.

Upon remand, the court of appeals again reversed the trial court's judgment in favor of the Lebers and against Buckeye Union.

This cause is now before this court pursuant to the allowance of a motion to certify the record.

PFEIFER, Justice. For the reasons that follow, we reverse the judgment of the court of appeals in part, affirm it in part, and reinstate all of the judgments rendered by the trial court.

I

The Claims against Buckeye Union

A

The appellate court reversed the trial court's judgment, in part, because it held that the trial judge improperly instructed the jury that the $10,150,000 judgment in *Leber I* and the *Leber I* trial court's finding of *respondeat superior* between the board and employees of the Sheriff's Department were binding on the parties in *Leber II*. The Lebers contest this reversal.

The law regarding contesting improper jury instructions on appeal is clearly articulated in Civ.R. 51(A), which provides:

"[A] party may not assign as error the giving or the failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection. * * * "

In the present case, Buckeye Union did not object to the trial judge's informing the jury that the judgment against the board in *Leber I* was binding on the jury in *Leber II*. Instead, Buckeye Union objected to another portion of the same jury instruction that informed the jury of the trial court's findings in the declaratory judgment action. Because Buckeye Union's reason for objecting to the jury instruction is not the same as its reason for objecting at trial, Buckeye Union was precluded from arguing on appeal that this instruction was improper. See *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, 24 O.O.3d 316, 436 N.E.2d

1001, paragraph one of the syllabus. Thus, the appellate court's reversal on this ground was improper.

B

The court of appeals determined that the Buckeye Union insurance policy did not cover Deputy Smith's negligence nor did it cover the negligent training of Smith conducted by the Sheriff's Department. The appellate court strictly interpreted the insurance contract and found that only the board was covered by the policy. We disagree.

Endorsement No. CBP 677G of the Buckeye Union policy stated in relevant part:

"It is agreed that the 'Persons Insured' provision of Part VI [the general liability section] is amended to include any employee of the named insured while acting within the scope of his duties as such * * *."

The policy expressly based its rates on four hundred twenty-one employees of the board. Testimony at trial revealed that employees of the Sheriff's Department were included in these four hundred twenty-one employees insured by the policy.

The trial court correctly concluded that the Buckeye Union policy provided coverage for the negligent conduct of Deputy Smith and the negligent training of Smith conducted by members of the Sheriff's Department.

Thus, the court of appeals' reversal on these grounds was improper.

C

On remand, the court of appeals determined that Buckeye Union was entitled to have the jury interpret the insurance contract. We disagree.

The interpretation of an insurance contract involves a question of law to be decided by a judge. In *Erie Ins. Group*

v. Fisher (1984), 15 Ohio St.3d 380, 15 OBR 497, 474 N.E.2d 320, a unanimous court held:

"A declaratory judgment action filed by an insurer against an insured, the purpose of which is to construe an insurance policy and determine the insurer's obligations to the insured, and is not for the purpose of determining liability in an action for the recovery of money, is properly triable to the court." *Id.* at syllabus.

In the present case, the trial judge interpreted the insurance contract but allowed the jury to determine factual issues such as the presence of malice and fraud or deceit. The judge perfectly divided the responsibilities between himself and the jury.

Thus, the court of appeals' reversal on these grounds was improper.

II

The Claims against Watts

The Lebers claim that they are entitled to reversal of the judgment in favor of Watts because the trial court failed to instruct the jury that the burden of proof was on Watts to prove that he did not breach the fiduciary duty owed to the board.

We disagree. The Lebers failed to object to Judge McMonagle's instructions to the jury regarding the appropriate burden of proof. Thus, pursuant to Civ.R. 51(A), they are precluded from objecting to the instructions at the appellate level.

Accordingly, we affirm the decision of the court of appeals to the extent it upheld the judgment of the trial court in favor of Watts and against the Lebers.

III

Because the court of appeals erred in the ways discussed in this opinion, we reverse the judgment of the court of appeals, in part, and reinstate all of the trial court's judgments. The findings of the jury should not be disturbed.

Judgment affirmed in part and reversed in part.

A.W. SWEENEY, DOUGLAS, SPELLACY AND FRANCIS E. SWEENEY, SR., JJ., concur.

MOYER, C.J., AND WRIGHT, J., dissent in part.

LEO SPELLACY, J., of the Eighth Appellate District, sitting for Resnick, J.

DOUGLAS, J, concurring. I concur with the majority's analysis of this case but am puzzled by the contentions of the dissent.

The dissent takes issue with the majority's conclusion that the Buckeye Union insurance policy provided coverage for the negligence of Deputy Smith. To support its objections to the majority opinion, the dissent contradicts itself. It criticizes the majority for examining evidence extrinsic to the Buckeye Union policy to determine who the four hundred twenty-one employees are that the policy insures, yet the dissent, in an attempt to devine the intent of the parties to the insurance policy, travels far outside the four corners of the policy and examines and compares extrinsic matters arising out of a completely different policy issued by American Home. The dissent compares the American Home policy's premiums and coverages to those in the Buckeye Union policy.

Worse yet, when the dissent examines this extrinsic evidence, it draws an improbable conclusion. The dissent concludes that because the Sheriff's Department purchased its own $300,000 liability policy with American Home for a

price significantly greater than the premium the board paid for its $1,000,000 liability policy with Buckeye Union, the board never intended its policy to insure the negligent acts of deputy sheriffs. Insurance coverage must be governed by the terms of the policy and not by the policy's actuarial soundness.

Worst of all, the dissent's examination of extrinsic evidence is conveniently—if not deceivingly—selective. When a thorough examination of the record is conducted, it is unquestionable that the Buckeye Union policy provided coverage for the negligence of Deputy Smith. The board published bid specifications describing the policy that it required. The Buckeye Union policy was issued to comply with those specifications. In item No. 6 of the section "Underwriting Instructions" of the 1978 Insurance Specifications (General Liability), the specifications required insurance to cover "all sums which the Board of County Commissioners of Erie County, Ohio shall become obligated to pay as damages by reason of liability imposed by law." The limit of liability for bodily injury was to be $1,000,000. The specifications go on to say that "[t]he name of the insured shall be: Board of County Commissioners of Erie County, Ohio, *[sic] and Erie County officers and employees*. It is understood and agreed that the inclusion of *officer* and *employees* as named insureds [is] ONLY AS RESPECT TO THEIR DUTIES." (Emphasis added.)

Whether Deputy Smith was an employee of the County Commissioners or the Sheriff (or both) makes little difference. He was to be covered by the policy according to the insurance specifications. The use of the words "Erie County officers and employees" cannot just be ignored. The reason is that the Sheriff is an Erie County "officer."

As far back as the year 1892, this court said in *State ex rel. Attorney General v. Brennan* (1892), 49 Ohio St. 33, 38-39, 29 N.E. 593, 594, that:

"It is not important to define with exactness all the characteristics of a public office, but it is safely within bounds to say that where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and continuance, with independent power to control the property of the public, or with public functions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office. And where such duties are wholly performed within the limits of a county, and for the people of that county, the salary to be paid by the disbursing officer of the county, from the funds of the county, *the office is a county office, and, as one who is lawfully invested with an office is an officer, the person lawfully filling such place is necessarily a county officer.*

"From these definitions and illustrations it is clear that the position created by the act in question is an office, *and that the defendant, if selected in the manner prescribed by law, is an officer.*" (Emphasis added.)

Further, "officer" is defined as a "[p]erson holding office of trust, command or authority in corporation, *government* * * * or other institution or organization." (Emphasis added.) Black's Law Dictionary (6 Ed.1990) 1083. "Official" is defined as "*An officer*; a person invested with the authority of an office. *See also* Officer." (Emphasis added.) *Id.* at 1084. Black's defines "County officers" as "[t]hose whose general authority and jurisdiction are confined within the limits of the county in which they are appointed, who are appointed in and for a particular county, and whose duties apply only to that county, and through whom the county performs its usual political functions." *Id.* at 351. "Appointment" is defined as "[t]he designation of a person, by the person or persons having authority therefor, to discharge the duties of some office or trust." *Id.* at 99.

R.C. 325.02 provides that "[t]he salaries and compensation of *county officers* provided for by sections 325.03 to 325.09 of the Revised Code, shall be in lieu of all fees, costs * * * and all other perquisites, of whatever kind * * *." (Emphasis added.) One of the "county officers" provided for is the county sheriff. R.C. 325.06. See, also, R.C. 305.02, 305.03 and 305.19.

Any way one cuts it, the policy issued in response to the 1978 insurance specifications includes coverage for Deputy Smith. The characterizations of the dissent are not well taken.

A.W. SWEENEY AND FRANCIS E. SWEENEY, SR., JJ., concur in the foregoing concurring opinion.

WRIGHT, Justice, dissenting in part. I respectfully dissent. I find the majority's brief and inaccurate treatment of the key issue in this complex case most disquieting. The facts surrounding this case make it crystal clear that the general liability section of the insurance policy issued by Buckeye Union to the Erie County Board of Commissioners ("the board") did not cover the Erie County Sheriff's Department or any of its deputy sheriffs. Thus, I would affirm the judgment of the court of appeals on the coverage issue.

The majority completely ignores the threshold question of the identity of the named insured. Without a proper analysis of this issue, the majority's subsequent conclusions not only are confusing, but fatally flawed.

In 1987, the trial court ruled that the liability policy covered *all* Erie County public employees, including the Sheriff's Department, even though the policy clearly named only the Erie County Board of Commissioners as the insured. The court of appeals reversed the trial court's judgment and correctly ruled that the policy covered, as stated, the Erie

County Board of Commissioners and its (the board's) employees.

In reversing the court of appeals' judgment on the issue of coverage, the majority purports to "reinstate all of the trial court's judgments." But the majority does not find, as the trial court did, that the policy covered all Erie County employees. Rather, the majority apparently concludes that the Erie County Sheriff's Department should somehow be considered employees of the board for purposes of the general liability coverage under the policy. Thus, the majority appears to agree with the court of appeals that the policy was limited to covering the board and its employees.

If the foregoing conclusion is true, the question asks itself—*i.e.*, were employees of the Erie County Sheriff's Department also employees of the board? Because the majority did not specifically ask that question, it apparently did not feel compelled to fully answer it, thus oversimplifying its analysis in reaching the conclusion that the Buckeye Union policy provided general liability coverage for the Sheriff's Department. Instead, the majority makes an inexcusable stretch and extends general liability coverage intended exclusively for the board and its employees to the members of the Sheriff's Department, based loosely on a rating factor used in another, unrelated, part of the policy. The following analysis conclusively shows that the Buckeye Union insurance policy covered only the board and its employees, and that the members of the Erie County Sheriff's Department were neither employees of the board nor insureds under the general liability section of the Buckeye Union insurance policy.

Ohio law instructs that "[i]f a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined." *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322, 15 OBR 448, 449, 474 N.E.2d 271, 272. Furthermore, this court consistently has

held that courts have "an obligation to give plain language its ordinary meaning and to refrain from rewriting the contractual agreement of the parties." *Miller v. Marrocco* (1986), 28 Ohio St.3d 438, 439, 28 OBR 489, 491, 504 N.E.2d 67, 69. In other words, "[w]hen the language of an insurance policy has a plain and ordinary meaning, it is unnecessary and impermissible for this court to resort to construction of that language." *Karabin v. State Auto. Mut. Ins. Co.* (1984), 10 Ohio St.3d 163, 166-167, 10 OBR 497, 499, 462 N.E.2d 403, 406.

Given the plain language of the insurance policy at issue here, there is no need to resort to extrinsic evidence (as the majority does) to determine the scope of the policy's coverage. Moreover, even in its improper attempt to determine the scope of the policy's coverage by resorting to extrinsic evidence, the majority inaccurately construes the extrinsic evidence in this case.

Buckeye Union's policy clearly and plainly listed only the board as the "named insured." Under the heading "Insured's Name and Mailing Address," the policy identified the insured as the "Commissioners of Erie County Sandusky, Ohio." Part V of the policy, the Business Auto Liability Insurance portion, listed the "Named Insured's Business" as the "Board of County Commissioners." Part VI of the policy, the Comprehensive General Liability Insurance portion, also listed the named insured as the "Board of County Commissioners."

There also is no question that, in addition to covering the board itself, the policy also covered the employees of the board. As noted by the majority, endorsement No. CBP 677G modified the policy's coverage under Part VI to include "any employee of the named insured while acting within the scope of his duties as such * * *." The question, therefore, insofar as coverage is concerned, is whether Deputy Smith

was an employee of the Board of County Commissioners. The answer to this question, of course, is in the negative.

The policy issued by Buckeye Union did not define the term "employee." Decisions of this court, however, hold that an employee-employer relationship exists "only when one party exercises the right of control over the actions of another and those actions are directed toward the attainment of an objective which the former seeks. For the relationship to exist, it is unnecessary that such right of control be exercised; it is sufficient that the right merely exists." (Citations omitted.) *Baird* v. *Sickler* (1982), 69 Ohio St.2d 652, 654, 23 O.O.3d 532, 533, 433 N.E.2d 593, 595.

The record contains NO evidence that the board had the right to control the Sheriff's Department or any of its deputies. In fact, the majority does not even mention this issue. Common sense militates against control of the sheriff's deputies by the board. Moreover, Ohio law does not confer upon the board such a right of control. R.C. 305.01 provides that "[t]he board of county commissioners shall consist of three persons," all of whom are elected officials. Under R.C. 311.01(A), each county also elects a sheriff, and R.C. 311.04 authorizes the sheriff alone (not the board of commissioners) to appoint deputies. Because only the sheriff has the power to appoint deputies, only the sheriff has the right to control their actions. Therefore, Deputy Smith was an employee of the Erie County Sheriff's Department and not of the board.

Nevertheless, regardless of the foregoing analysis, which the majority fails to undertake, the majority finds that the general liability section of the Buckeye Union policy covered the Sheriff's Department. Unfortunately, in its hasty attempt to determine whether "any employee of the named insured" includes employees of the Sheriff's Department, the majority misconstrues the evidence in this case. The majority concludes that Smith and the Sheriff's Department are

employees of the board by relying on only two facts: (1) "[t]he policy expressly based its rates on four hundred twenty-one employees of the board," which allegedly includes the employees of the Sheriff's Department, and (2) "Buckeye Union analysts believed that Buckeye Union was liable under the terms of its policy." However, these statements are simply not accurate.[1] A close review of the entire record reveals that employees of the Sheriff's Department clearly were not covered under the section of the Buckeye Union policy at issue in this case.

A brief explanation of the board's insurance policies, which the majority opinion ignores, is necessary to fully understand the scope of the general liability coverage under the Buckeye Union policy. When the Leber incident occurred, an American Home Assurance Company policy covered personal injury liability incurred by the Sheriff's Department. The insurance policy between the Board of Commissioners and Buckeye Union was a comprehensive business policy, containing six mutually exclusive coverages. Two of these mutually exclusive coverages were Part V, Comprehensive Automobile Liability coverage, and Part VI, Comprehensive General Liability ("CGL") coverage, which

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[1] A concurrence argues that the Buckeye Union policy provides coverage for Deputy Smith (and the whole Sheriff's Department for that matter), because the board's bid specifications stated that the named insured would be the board and Erie County officers and employees. However, the concurrence overlooks the fact that the policy itself omits the words "Erie County" as a modifier to the word "employee." As previously noted, the Board of County Commissioners is the only "named insured" under the plain language of the policy, and the policy merely covers "any employee of the named insured." If anything, the deletion of the words "Erie County" between the time of the bid specifications and the final terms of the policy suggests that the policy provides coverage only for direct employees of the board, not all employees of the entire county of Erie.

covered bodily injury and property damage. The two policies were not duplicative. The Buckeye Union policy was the only policy that covered county automobile liability. The American Home policy was the only policy that covered personal injury liability incurred by the Sheriff's Department.

The CGL coverage under Part VI of the Buckeye Union policy is the only coverage that is at issue in this case. The definition of "Persons Insured" relied upon by the majority opinion is found in Part VI of the policy.

The majority opinion states, "The policy expressly based its rates on four hundred twenty-one employees of the board." This statement is misleading at best. Buckeye Union based its premiums on four hundred twenty-one employees *only for purposes of automobile coverage*, which appears in Part V, not Part VI of the policy. Buckeye Union needed to base its premiums for the automobile coverage on four hundred twenty-one employees because the Buckeye Union policy was the only policy that covered governmental automobile liability, and Part V extended automobile liability coverage to "any auto" used by a county employee.

Unlike Part V (the automobile coverage under the Buckeye Union policy), Part VI (the general liability coverage that is the sole issue in this case), clearly did not cover four hundred twenty-one employees. Instead, the facts reveal that Part VI covered only the direct employees of the Board of Commissioners, which did not include employees of the Sheriff's Department. The American Home policy already covered personal injuries for which the Sheriff's Department would be liable. Another policy covering such injuries would have been duplicative.

Even more convincing, the premiums that the board paid for bodily injury coverage under the general liability section of the Buckeye Union policy were far too low to cover four hundred twenty-one people. The record reveals that the board paid annual premiums of only $2,929 for bodily injury

coverage under the general liability section, which included no deductible. There is no doubt that the premium for bodily injury coverage of four hundred twenty-one people would have been much higher.

The premium that the board paid for bodily injury coverage was especially low when compared to the annual premium that the Sheriff's Department paid under the American Home policy for personal injury coverage of only sixty-two employees. The Sheriff's Department had to pay annual premiums of over $10,000, with a $1,000 deductible, for only sixty-two employees. Moreover, the American Home policy had much lower coverage limits than the Buckeye Union policy. The American Home policy had limits of $100,000 for each person and $300,000 for each incident. The bodily injury portion of the Buckeye Union policy covered up to $1,000,000 for each occurrence. Therefore, if the majority opinion is correct, the board, compared with the premiums the Sheriff's Department paid under the American Home policy, would have paid Buckeye Union less than one-third in premiums to get ten times the coverage, with no deductible, for nearly seven times as many employees. Such terms are just too good to be true. Clearly, the general liability section of the Buckeye Union policy covered fewer than four hundred twenty-one people.

The majority opinion also states that "Buckeye Union analysts believed that Buckeye Union was liable under the terms of its policy." This statement is also inaccurate. Only a single local adjuster, who apparently had no legal background and no authority to make coverage decisions, thought that Buckeye Union was liable under the policy. Responsible Buckeye Union officials, who had authority to make coverage decisions, concluded that the policy did not cover the Sheriff or any of the sheriff's deputies.

It is very clear to me that the insurance policy issued by Buckeye Union provided no general liability coverage for the

actions of the Erie County Sheriff's Department or any of its deputies. In light of the foregoing analysis, I think it borders on outrageous that a "bad faith" claim could survive a directed verdict. We have deprived Buckeye Union of due process of law in this matter.

For the foregoing reasons, I would affirm the decision of the court of appeals regarding the coverage issue.

MOYER, C.J., concurs in the foregoing opinion.

APPENDIX B

THE SUPREME COURT OF OHIO
1994 TERM

Eugene A. Leber et al.,	:	To wit: December 7, 1994
Appellants,	:	Case No. 93-646
	:	
v.	:	RECONSIDERATION
	:	ENTRY
Steven A. Smith, etc.,	:	
(Buckeye Union Ins. Co.)	:	(Erie County)
Appellees.	:	

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and the same is hereby, denied.

(Court of Appeals No. E8743)

THOMAS J. MOYER
Chief Justice

APPENDIX C

THE SUPREME COURT OF OHIO
1993 TERM

Eugene A. Leber et al.,	:	To wit: June 23, 1993
Appellants,	:	Case No. 93-646
	:	
v.	:	ENTRY
	:	
Steven A. Smith, etc., et al.,	:	
Appellees.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Erie County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion and the appeal are allowed on Propositions of Law No. I, II, III, IV, V, VI and VII only.

IT IS FURTHER ORDERED by the Court, *sua sponte*, that Propositions of Law Nos., VIII and IX are dismissed.

IT IS FURTHER ORDERED by the Court, *sua sponte*, that the following causes are dismissed: 89-688, *Leber v. Smith*; 92-1987, *Leber v. Smith*; and 93-832, *State, ex rel. Erie Cty. Bd. of Commrs. v. Kobalka*.

(Court of Appeals No. E8743)

A. WILLIAM SWEENEY
Acting Chief Justice

APPENDIX D

IN THE COURT OF APPEALS OF ERIE COUNTY

Eugene A. Leber et al.,	:	Court of Appeals
	:	No. E-87-43
	:	
Appellees/Cross-Appellants	:	Trial Court No. 45270
	:	
v.	:	
	:	
Steven A. Smith, etc.,	:	
(Buckeye Union Ins. Co.)	:	DECISION AND
Appellants/Cross-Appellees.	:	JUDGMENT ENTRY
	:	
	:	Decided: Jan. 25, 1993

* * * * *

Appellee/cross-appellant Raymond N. Watts has filed a motion requesting this court to rule upon assignments of error raised by cross-appeal in June 1988. This court originally issued a decision on March 3, 1989 in which several assignments of error, including those of appellee/cross-appellant Raymond N. Watts were declared moot. That decision was appealed to the Supreme Court of Ohio. The Supreme Court remanded the case to this court in response to a motion filed by appellee Buckeye Union Insurance Company which sought rulings on assignments of error raised by appellee Buckeye Union Insurance Company. On August 7, 1990, this court issued a decision in compliance with the remand order of the Supreme Court of Ohio. No further action remains to be taken by this court. The motion of appellee/cross-appellant Raymond N. Watts is not well-taken and is denied.

George M. Glasser, P.J. _____
PRESIDING JUDGE

Peter M. Handwork, J. _____
CONCUR JUDGE

APPENDIX E

THE SUPREME COURT OF OHIO
1993 TERM

	:	To wit: March 17, 1993
	:	
Eugene A. Leber et al.,	:	Case No. 92-1987
Appellants,	:	
	:	
v.	:	REHEARING ENTRY
	:	
Steven A. Smith, etc.,	:	
et al.,	:	(Erie County)
Appellees.	:	

This cause came on for further consideration upon appellant's third motion for rehearing; motion to vacate order of February 10, 1993; motion to decide motion to vacate filed January 11, 1993; and motion for appointment of acting justices. Upon consideration thereof,

IT IS ORDERED by the Court that said motions be, and the same are hereby, denied.

(Court of Appeals No. E8743)

THOMAS J. MOYER
Chief Justice

APPENDIX F

THE SUPREME COURT OF OHIO
1992 TERM

	:	To wit:
	.	December 18, 1992
	:	
Eugene A. Leber et al.,	:	
Appellants,	:	Case No. 92-1987
	:	
v.	:	ENTRY
	:	
Steven A. Smith, etc., et al.,	:	
Appellees.	:	
	:	

Upon consideration of the motion for an order directing the Court of Appeals for Erie County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Murray & Murray.

(Court of Appeals No. E8743)

THOMAS J. MOYER
Chief Justice

APPENDIX G

THE SUPREME COURT OF OHIO
1992 TERM

	:	To wit:
	:	September 30, 1992
	:	
Eugene A. Leber,	:	
Appellant,	:	Case No. 89-688
	:	
v.	:	ENTRY
	:	
Steven A. Smith, et al.,	:	
Appellants.	:	

This cause came on for further consideration upon appellants' motion to order court of appeals to transmit record. Upon consideration thereof,

IT IS ORDERED by the Court that said motion to order court of appeals to transmit record be, and the same is hereby, denied.

THOMAS J. MOYER
Chief Justice

APPENDIX H

IN THE COURT OF APPEALS

Eugene A. Leber, et al. Appellees/Cross-Appellant	:	Case No. 89-688
v.	:	DECISION AND JUDGMENT ENTRY
Steven A. Smith, et al., (Buckeye Union Ins. Co.) Appellants/Cross-Appellees	:	Decided: August 7, 1992

This matter is before the court on a remand from the Supreme Court of Ohio to make determinations as to assignments of error which were presented and briefed but to which no express determination was made in accordance with App.R. 12(A).

For the limited purpose of addressing these assignments of error which appellant, Buckeye Union Insurance Company, asserts were not expressly decided, this court adopts the facts as set forth in its March 3, 1989 opinion.

Appellant asserts in its motion to remand that this court's determination that Assignments of Error Nos. 3, 6, 7, 8, and 9 were rendered moot by this court's entry of final judgment in favor of appellant violates App.R. 12(A). The Supreme Court of Ohio granted appellant's motion on the grounds set forth by appellant.

The subject assignments of error read as follows:

"ASSIGNMENT OF ERROR NO. III.

"The Trial Court Erred in Adjudicating the Declaratory Judgment Action, Without a Jury, Before Submitting the Pending Claims for Money Damages to a Jury, Thereby Depriving Defendant Buckeye Union of its Constitutional and Statutory Rights to Trial by Jury.

"ASSIGNMENT OF ERROR NO. VI.

"The Trial Court Erred When it Concluded as a Matter of Law that the Dismissal of the Appeal by the Board of County Commissioners in the Underlying Civil Action Did not Construe a Material Breach of the Cooperation Clause Contained in the Buckeye Union Policy.

"ASSIGNMENT OF ERROR NO. VII.

"The Trial Court Erred in Holding that the August 7, 1984 Judgment Entry in the Amount of $10,150,000 was the Appropriate Measure of Damages Incurred by the Board of County Commissioners, the Erie County Sheriff and Deputy Steven Smith, Where Those Defendants had Resolved Their Liability for a Total of $2,000,000.

"ASSIGNMENT OF ERROR NO. VIII.

"The Trial Court Erred in its Jury Charge, in that the Cha[r]ge contained Numerous Misstatements of Law on Issues Central to this Litigation, and It Contained Repetitious, Inconsistent and Confusing Statements of Law, to the Prejudice of Buckeye Union.

"ASSIGNMENT OF ERROR NO. IX.

"The Trial Court Erred by Refusing to Submit Buckeye Union's Proposed Jury Interrogatory No. 3, 4, 5, and 8, which Interrogatories were timely submitted and were directed to Determinative Issues in the Case."

In appellant's third assignment of error, and the first to be considered upon remand, it asserts that the trial court erred

when it made a finding in the declaratory judgment action instituted by appellee's seventh cause of action, while in the absence of the jury.

It is axiomatic that an insurance policy is considered a contract and as such is subject to construction in a declaratory judgment proceeding. *Employers Liability Assur. Corp. v. Liberty Mutual Ins. Co.* (1959), 11 O.O.2d 190, 191. Under R.C. 2721.03, "[a]ny person interested under a *** written contract *** may have determined any question of construction or validity arising under such instrument ***."

In addition, a number of courts have determined that when, in a declaratory judgment action, a party seeks to have declared the rights, duties, and obligations of the parties to an insurance policy, that determination is a matter of fact properly triable to the court. *Erie Ins. Group v. Fisher* (1984), 15 Ohio St. 3d 380.

In *Erie*, which involved a dispute as to liability under an automobile liability policy, the Supreme Court of Ohio went on to say that once a judgment has been obtained against an alleged insured a supplemental petition against the insurer to obtain payment is an action for "the recovery of money only" and therefore a right to trial by jury attaches as per R.C. 2311.04. *Id.* at 382.

In the present case a judgment had been obtained in a previous case against the alleged insureds under the policy issued by appellant. The present action was instituted for determination of appellant's liability under that policy with a recovery of money to be the ultimate result. The record indicates no waiver of appellant's right to a jury, and no consent to a reference under the Rules of Civil Procedure required under R.C. 2311.04.

Consequently, in view of the foregoing, appellant had a right to a trial by jury as to the determination of its liability under the subject insurance policy, and the trial court erred

in making that determination in the absence of the jury. However, in light of this court's determination as to appellant's other substantive assignments of error, this court determines that the trial court's error was not harmful and was not inconsistent with substantial justice pursuant to Civ.R. 61. Appellant's third assignment of error, and the first considered on remand, is hereby found not well-taken.

Appellant, in its sixth assignment of error which is the second to be considered on remand, argues that the Erie County Board of Commissioners' settlement, in which it agreed to dismiss an appeal of the August 7, 1984 verdict, was a material breach of the cooperation clause of the subject insurance policy.

In view of this court's determination in the other substantive assignments of error, appellant's sixth assignment of error is found not well-taken.

In appellant's seventh assignment of error, it asserts that the trial court's determination of damages in the August 7, 1984 judgment was incorrect in light of a prior settlement agreement in the amount of $2,000,000.

Again, in light of this court's determination as to other more substantive assignments of error, appellant's seventh assignment of error is found not well-taken.

In Assignment of Error No. 8, it is asserted that the trial court erred in its jury charge. This court has herein made determinations as to the errors assigned on more substantive issues and therefore this assignment of error is found not well-taken.

In appellant's Assignment of Error No. 9, it argues that interrogatories which were timely submitted were refused submission by the trial court. This assignment of error too is found not well-taken in view of this court's decision regarding other substantive assignments of error.

In view of the foregoing, substantial justice has been done to the parties in the above captioned case.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/80.

George M. Glasser, P.J. _____
PRESIDING JUDGE

Peter M. Handwork, J. _____
CONCUR. JUDGE

APPENDIX I

THE SUPREME COURT OF OHIO
1989 TERM

	:	To wit: October 18, 1989
	:	
Eugene A. Leber et al.,	:	
Appellant,	:	Case No. 89-688
	:	
v.	:	ENTRY
	:	
Steven A. Smith, et al.,	:	
Appellees.	:	

This cause is pending before the Court as an appeal from the Court of Appeals for Erie County. Upon consideration of appellee's (Buckeye Union Insurance Co.) motion to remand to the Court of Appeals for Erie County,

IT IS ORDERED by the Court that said motion be, and the same is hereby, granted.

(Court of Appeals No. E8743)

THOMAS J. MOYER
Chief Justice

APPENDIX J

THE SUPREME COURT OF OHIO
1989 TERM

	:	To wit: August 2, 1989
Eugene A. Leber et al.,	:	
Appellants,	:	Case No. 89-688
v.	:	ENTRY
Steven A. Smith, et al.,	:	
Appellees.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Erie County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion and the appeal are allowed.

(Court of Appeals No. E8743)

THOMAS J. MOYER
Chief Justice

APPENDIX K

IN THE COURT OF APPEALS OF ERIE COUNTY

Eugene A. Leber, et al.,	:	C.A. No. E-87-43
	:	
Plaintiffs-Appellees Cross-Appellants	:	C.A. No. 45270
	:	
v.	:	
	:	*OPINION*
Steven A. Smith, etc., et al. (Buckeye Union Ins. Co.)	:	
	:	
Defendant-Appellants Cross-Appellees	:	Decided: March 3, 1989

* * * * *

CONNORS, J. This cause is before this court on appeal from the Erie County Court of Common Pleas. Therein, the trial court entered judgment upon a jury verdict, in addition to ruling upon a declaratory judgment action.

Due to the complex factual and procedural nature of this case, a detailed discussion of the chain of events giving rise to the current litigation would be onerous, and is

unwarranted.[1] It is sufficient to dispose of all the issues on appeal by summarizing the relevant facts as follows.

During the early morning hours of April 7, 1979, Erie County Deputy Sheriff Steven A. Smith accidentally shot Eugene Leber. According to testimony in the record, Deputy Smith was involved in an automobile chase with an auto driven by Leber. After avoiding one roadblock, Leber stopped at a second roadblock set up by additional law enforcement officers. As he approached Leber's stopped car on foot, and with his firearm drawn, Deputy Smith slipped on a puddle of ice near the left front headlight of his cruiser. This resulted in the accidental discharge of his weapon that caused Leber's injury.[2]

Lebers filed suit in the United States District Court claiming a civil rights violation. That entire action was dismissed, and summary judgment granted for the defendants

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[1] Both of the major parties to this appeal would direct this court's attention to testimony and evidence adduced in the lower court proceedings that are not relevant to this appeal. For example, counsel for Eugene Leber, et al., cites testimony indicating Deputy Smith was poorly trained, that Deputy Smith had altered the weapon, etc. Buckeye Union, on the other hand, discusses testimony relating to Eugene Leber's state of mind, suggesting Mr. Leber was mentally and emotionally unstable, suffering from severe depression over a break-up with a girlfriend. Buckeye further points out that on the night in question (April 7, 1979) the sheriffs department was summoned to the Leber residence by Mr. Leber's brother, who informed the two responding officers that Eugene was very upset and possibly contemplating suicide. While these and other numerous facts provide background information, they are not pertinent to nor dispositive of the issues on appeal.

[2] As a result of the accident, Eugene Leber has been rendered a permanent paraplegic.

was affirmed on appeal. *Leber* v. *Smith* (C.A.6, 1985), 773 F.2d 101.

The case was refiled in the Erie County Court of Common Pleas in June 1983. (Hereinafter referred to as *Leber I*). The parties to this action were Eugene Leber and his parents as plaintiffs; while Deputy Smith, the Sheriff of Erie County and the Board of Erie County Commissioners were the named defendants. As far as it is pertinent to this appeal, the law firm of Eastman & Smith was assigned to defend Deputy Smith and the Sheriff under an insurance policy issued to the sheriff's department by American Home Assurance Company. The Board of Erie County Commissioners was represented by Raymond Watts pursuant to a policy issued to the board by Buckeye Union Insurance Company on October 29, 1979.

Settlement negotiations commenced both before and during the trial. The Lebers demanded to settle the case for $2,300,000. The board's position was that settlement of the case could not be discussed until Buckeye Union offered to participate and contribute to that amount. Buckeye Union, however, contended that there was no insurance coverage for the Sheriff of Erie County or deputy sheriff in the lawsuit. Similarly, Buckeye Union did not offer to participate in the settlement contribution. Ultimately, the negotiations proved fruitless and the board concluded that the jury would have to make the final decision.

Upon the return of a jury verdict in favor of the plaintiffs, the trial court entered judgment for the Lebers in the amount of $10,150,000 on August 7, 1984. However, the trial judge had previously ruled that the Board of Erie County Commissioners was liable for the negligence of the sheriff and its deputies under the doctrine of *respondeat superior*. Therefore, the board was held liable for the full amount. The Lebers appealed from this judgment arguing that the trial judge erred in reducing the jury award from $10,240,000 to

$10,150,000. The defendants also appealed on differing grounds and various theories.

Following the verdict in *Leber I*, the Lebers instituted a taxpayer's suit against both insurance carriers (American Home and Buckeye Union). Additionally, the Board of Erie County Commissioners filed a declaratory judgment action against Buckeye Union regarding policy coverage, seeking a determination as to the rights, duties, and obligations of the parties to the insurance contract.

After oral argument of *Leber I* on appeal, the Lebers settled their case against all three of the original defendants (Deputy Smith, the Sheriff of Erie County and the Board of Erie County Commissioners). This settlement agreement was made over Buckeye Union's objections. Pursuant to the agreement, the board agreed to pay the Lebers $2,000,000 over a five-year period and to assign the board's rights against Buckeye Union to the Lebers. Similarly, Deputy Smith and the Sheriff of Erie County assigned their rights against the insurance carriers to the Lebers. Neither of the insurance companies consented to nor were a party to this agreement. In return, all of the appeals in *Leber I* were dismissed.

Following the settlement, the Lebers filed an amended complaint naming Eastman & Smith as a defendant. The Lebers also intervened in the board's declaratory judgment action against Buckeye Union and were joined as party-plaintiffs. A motion to consolidate all of the actions was granted by agreement of all counsel on January 23, 1987. As a result of consolidation, the plaintiffs were now the Lebers, as assignees of all claims pursuant to the settlement covenant, and the Board of County Commissioners. The defendants were Buckeye Union, American Home Assurance Co. and Eastman & Smith. Raymond Watts, attorney for the board in *Leber I*, was subsequently named as an additional defendant.

As to Buckeye Union, the plaintiffs claimed bad faith in failing to settle the underlying case (*Leber I*) within policy limits. Plaintiffs also claimed that Buckeye Union's policy limits exceeded $1,000,000. Similar claims were made against American Home. However, two weeks into trial American Home settled their case with the Lebers for $2,000,000. In regard to Eastman & Smith and Raymond Watts, plaintiffs asserted claims for legal malpractice on varying theories. The allegations concerning Eastman & Smith were that the firm had failed to expand coverages under both policies on behalf of all insureds and for failing to put pressure on Buckeye Union to settle in *Leber I*. The claim of malpractice against Watts was for, *inter alia*, drafting an opinion letter stating that Deputy Sheriff Smith was not an insured under Buckeye Union policy while Watts represented the Board.

The trial of the consolidated case as set forth above is now the subject of this appeal. This trial began on June 29, 1987. Prior to opening statements the trial judge indicated, without objection from any party, that the trial court would decide the declaratory judgment action within the consolidated case.

Following approximately six weeks of trial in which evidence and testimony were presented by all of the parties, the trial court filed its judgment entry concerning the declaratory judgment action on August 10, 1987. Therein, the lower court held that: (1) the settlement agreement between the Lebers and the original defendants in *Leber I* constituted a proper assignment of rights and legal claims; (2) for the purposes of the insurance policy issued by Buckeye Union to the board on October 29, 1978, the terms Board of Erie County Commissioners and Erie County are synonymous; (3) Deputy Steven Smith is an employee of Erie County and the Board of Erie County Commissioners; (4) Deputy Smith and the Erie County Sheriff were insureds under the Buckeye Union policy; (5) the injuries sustained by

Eugene Leber were the results of two occurrences for the purposes of the Buckeye Union policy, to wit: (i) the negligent training of Deputy Smith and (ii) the negligent conduct of Deputy Smith resulting in the shooting; (6) as a result of the two occurrences, the Buckeye Union policy provides a total of $2,000,000 in coverage.

In ruling that the Buckeye Union policy provided coverage, the trial court stated:

> "*** Part VI of the Buckeye policy, as a result of these two occurrences, provides a total of $2,000,000.00 in applicable insurance coverage: $1,000,000.00 for the negligent training of Smith by the Erie County Sheriff and $1,000,000.00 for the negligent conduct of Deputy Smith resulting in the shooting of Eugene Leber. Alternatively, in the event that only $1,000,000.00 of insurance proceeds is ultimately determined, as a result of appellate review, to be owing under Part VI of the policy, this Court determines that Part V of the policy applies in that there is a reasonable causal connection between Deputy Smith's use of the Sheriff's Department cruiser and injuries sustained by Eugene Leber. The injuries sustained by Eugene Leber resulted, at least in part, from the use of the Sheriff's Department cruiser by Deputy Smith, providing $1,000,000.00 of applicable coverage under Part V of the policy in the event it is determined that there were not separate occurrences under Part VI of the policy. ***"

Part VI of the policy is Comprehensive General Liability Insurance, whereas Part V of the policy pertains to Business Auto Liability Insurance. Subsequently, the trial court entered judgment against Buckeye Union and in favor of the plaintiffs (Lebers) in the sum of $2,000,000, plus interest on the full amount of the $10,150,000 judgment rendered against the board in *Leber I*. The trial court explained that this was

pursuant to the insurance contract, Buckeye Union having failed to deposit or tender its applicable policy limits.

On August 13, 1987 (three days after the declaratory judgment action was decided) , the jury returned a verdict in favor of the plaintiffs and against Buckeye Union in the amount of $10,150,000 plus interest. In response to interrogatories, the jury found that Buckeye Union had acted in bad faith and with actual malice. The jury found in favor of both Eastman & Smith and Raymond Watts regarding the malpractice claims asserted by the Lebers.

The trial court filed its judgment entry on the jury verdicts on September 4, 1987. The court entered judgment for the Lebers in the amount of $13,336,232.80, the components of which were: (1) the $10,150,000 jury verdict, plus interest from the date of the verdict in *Leber I* (August 7, 1984); (2) prejudgment interest of $2,121,767.06, representing interest from July 5, 1982 to August 7, 1984; (3) the amount entered in judgment by the trial court on August 10, 1987 pertaining to the declaratory judgment action. The trial court then found Buckeye Union was entitled to a setoff in the sum of $2,000,000, that amount constituting the settlement paid to the Lebers by American Home Assurance Company after two weeks of trial. Finally, the lower court assessed costs to Buckeye Union, including reasonable attorney fees pursuant to R.C. 309.13.

Buckeye Union timely appealed both the judgment entry filed August 10, 1987 on the declaratory judgment action and the judgment entry on the jury verdict as set forth above. The plaintiffs filed a cross-appeal attacking the trial court's finding that Buckeye Union was permitted to a setoff and in overruling plaintiff's motion for a judgment notwithstanding the verdict or, in the alternative, a new trial as to defendants Eastman & Smith and Raymond Watts. Similarly, both Watts and Eastman & Smith have filed cross-appeals, essentially

alleging that each of them should have been granted directed verdicts.

Appellant/cross-appellee Buckeye Union's assignments of error are as follows:

"ASSIGNMENT OF ERROR NO. I.

The Trial Court Erred in Denying Defendant Buckeye Union's Request that the Jury Venire be Drawn from a County Adjoining Erie County, as Required by §2311.42 of the Ohio Revised Code.

"ASSIGNMENT OF ERROR NO. II.

The Trial Court Erred in its Interpretation of the Insurance Contract as a Matter of Law; Alternatively, the Trial Court erred by Concluding that the Interpretation of Ambiguities of Contracts is a Matter of Law.

"ASSIGNMENT OF ERROR NO. III.

The Trial Court Erred in Adjudicating the Declaratory Judgment Action, Without a Jury, Before Submitting the Pending Claims For Money Damages to a Jury, Thereby Depriving Defendant Buckeye Union of its Constitutional And Statutory Rights to Trial by Jury.

"ASSIGNMENT OF ERROR NO. IV.

The Trial Court Erred in Concluding as a Matter of Law, and in Instructing the Jury, That the August 7, 1984, Judgment in Leber v. Smith was Binding on Defendant Buckeye Union for the Purpose of the Present Action.

"ASSIGNMENT OF ERROR NO. V.

The Trial Court Erred in Concluding as a Matter of Law, and in Instructing the Jury, That Deputy Smith was an Employee of the Board of Erie County Commissioners.

"ASSIGNMENT OF ERROR NO. VI.

The Trial Court Erred when it Concluded as a Matter Of Law that the Dismissal of the Appeal by the Board of County Commissioners in the Underlying Civil Action Did not Constitute a Material Breach of the Cooperation Clause Contained in the Buckeye Union Policy.

"ASSIGNMENT Of ERROR NO. VII.

The Trial Court Erred in Holding that the August 7, 1984 Judgment Entry in the Amount of $10,150,000 was the Appropriate Measure of Damages Incurred by the Board of County Commissioners, the Erie County Sheriff and Deputy Steven Smith, Where Those Defendants had Resolved Their Liability for a Total of $2,000,000.

"ASSIGNMENT OF ERROR NO. VIII.

The Trial Court Erred in its Jury Charge, in that the Charge contained Numerous Misstatements of Law on Issues Central to this Litigation, and It Contained Repetitious, Inconsistent and Confusing Statements of Law, to the Prejudice of Buckeye Union.

"ASSIGNMENT OF ERROR NO. IX.

The Trial Court Erred by Refusing to Submit Buckeye Union's Proposed Jury Interrogatory Nos. 3, 4, 5 and 8, which Interrogatories were Timely Submitted and were Directed to Determinative Issues in the Case.

"ASSIGNMENT OF ERROR NO. X.

The Jury's Verdict Finding Buckeye Union Liable For Bad Faith Was Contrary to the Clear and Manifest Weight of the Evidence, when that Evidence is Evaluated under the Proper Legal Standard.

"ASSIGNMENT OF ERROR NO. XI.

The Trial Court Erred in Awarding Plaintiffs Prejudgment Interest on the Underlying Judgment of $10.15 Million Dollars.

"ASSIGNMENT OF ERROR NO. XII.

The Trial Court Erred in Awarding Plaintiffs Post-Judgment Interest With Respect to the Underlying Judgment in an Amount Calculated for the Period from August 7, 1984 to September 4, 1987.

"ASSIGNMENT OF ERROR NO. XIII.

The Trial Court Erred in Awarding Plaintiffs Their Costs and Attorney Fees under R.C. 309.13."

In the first assignment of error, Buckeye Union contends that the jury venire was improper, and in violation of R.C. 2311.42. This code section requires a trial court to summon the jury venire from an adjoining country where it appears that the board of county commissioners of the county where the action is pending is a party. Buckeye Union argues that the trial court's refusal to adhere to the terms of the statute was prejudicial error, requiring reversal. Alternatively, cross-appellant Leber asserts that R.C. 2311.42 has been superseded by Civ. R. 3(B).

This court need not decide this issue, because we find that any error on the part of the trial court regarding R.C. 2311.42 can only be considered harmless error. Buckeye Union has not demonstrated any prejudice in the jury selection process, and seems to assert that the violation is reversible error *per se*. This court cannot agree with the contention. Consequently, Buckeye Union's first assignment of error is found not well-taken.

Buckeye Union's second assignment of error essentially attacks the trial court's rulings as to the declaratory judgment action. The argument urged upon this court that the lower

court erred in its interpretation of the insurance contract between Buckeye Union and the Board of Erie County Commissioners. Furthermore, Buckeye Union asserts that the jury instructions based upon these conclusions and interpretations were also erroneous.

As a starting point, this court notes that the contract of insurance is clear and unambiguous. Neither Buckeye Union nor the Lebers contend otherwise. "If a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined." *Inland Refuse Transfer Co.* v. *Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St. 3d 321, 322 (citing *Alexander* v. *Buckeye Pipe Line Co.* (1978), 53 Ohio St. 2d 241 [7 O.O. 3d 402]).

The first issue raised by Buckeye Union pertains to the trial court's identification of the named insured under the policy. In construing the policy, the trial court ruled the terms "Board of Erie County Commissioners" and "Erie County" were synonymous, and thus in effect ruled that Erie County was the named insured. Upon reviewing the policy in question, this court finds that the named insured is the "Board of Erie County Commissioners" and that the trial court erred in extending this term to include Erie County.

The law in Ohio is well established that "*** [w]here the terms in an existing contract are clear and unambiguous, this court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." *Alexander, supra,* at 246. (Citations omitted.) Likewise, "*** [a] court has an obligation to give plain language its ordinary meaning and to refrain from rewriting the contractual agreement of the parties." *Miller* v. *Marrocco* (1986), 28 Ohio St. 3d 438, 439. (Citations omitted.)

The identification of the named insured within the insurance contract at hand clearly and plainly states that the "Board of Erie County Commissioners" is the named insured as to Part V and Part VI. "*** When the language of an

insurance policy has a plain and ordinary meaning, it is unnecessary and impermissible for this court to resort to construction of that language." *Karabin* v. *State Automobile Mut. Ins. Co.* (1984), 10 Ohio St. 3d 163, 166-167. (Citation omitted.) The term "Board of Erie County Commissioners" identifies a specific entity that has a plain and well known meaning. As such, the lower court erred by refusing to assign its plain and ordinary meaning.

A related question presented for review by Buckeye Union concerns the trial court's determination that the Erie County Sheriff's Department and Deputy Smith are insureds under the policy. Because this issue is more easily and fully understood by discussing it along with Buckeye Union's fifth assignment of error, this court will consider both simultaneously in a later portion of this opinion.

Buckeye Union's next contention relates to the trial court's application of automobile coverage, under Part V of the policy. Section IV of that portion of the policy states that the insurer will pay "*** all sums the insured legally must pay as damages because of bodily injury or property damage to which this insurance applies, caused by an accident and *resulting from the ownership, maintenance or use of a covered auto.*" (Emphasis added.) The trial court held that there was a reasonable causal connection between Deputy Smith's use of a sheriff's department cruiser and Eugene Leber's injuries, so that the accident fell within applicable coverage under the policy.

"*** The relevant inquiry is whether the chain of events resulting in the accident was unbroken by the intervention of any event unrelated to the use of the vehicle." *Kish* v. *Central Nat. Ins. Group* (1981), 67 Ohio St. 2d 41, 50. Applying this test to the instant facts, this court concludes that Deputy Smith's slipping on a puddle of ice and the subsequent accidental discharge of his weapon were intervening events sufficient to break the chain of causation.

The injury to Eugene Leber resulted from an act wholly disassociated from and independent to the use of the vehicle. See *Kish, supra*, at 50. Therefore, the lower court erred in holding that the Buckeye Union policy afforded coverage under the Business Auto Liability Insurance provision. Based on the above reasoning, Buckeye Union's second assignment of error is found well-taken insofar as the issues discussed.

This court now reaches the issue which is at the very core of the case *sub judice*. In its fifth assignment of error, Buckeye Union argues that the trial court erred in concluding as a matter of law and in instructing the jury that Deputy Smith was an employee of the Board of Erie County Commissioners. There is no doubt that the policy provides coverage for the employees of the board, but it must still be determined whether or not Deputy Smith was in fact an employee of the board. The term "employee" is not defined within the policy itself.

The trial court stated in its judgment entry on the declaratory judgment action that Deputy Smith is an employee of Erie County and the Board of Erie County Commissioners. This court has already concluded that the named insured is the Board of Erie County Commissioners, and not Erie County. For the following reasons, this court now holds that Deputy Smith is not an employee of the Board of Erie County Commissioners.

Without question, it is well recognized in Ohio law that the determinative factor for deciding whether an employer-employee relation exists is the right of control standard. The Supreme Court of Ohio has recently stated:

> *"The relationship* of principal and agent or *master and servant exists only when one party exercises the right of control over the actions of another*, and those actions are directed toward the attainment of an objective which the former seeks. (*Councell* v. *Douglas* [1955], 163 Ohio St. 292 [56 O.O. 262]; *Baird* v. *Sickler* [1982], 69 Ohio

> St. 2d 652 [23 O.O.3d 532], approved and followed.)" *Hanson* v. *Kynast* (1986), 24 Ohio St. 3d 171 at paragraph one of the syllabus. (Emphasis added.)

There is no evidence in the record that the Board of Erie County Commissioners ever expressed or exerted a right of control over the sheriff's department or the actions of its deputies.[3] Moreover, Chapter 305 and 307 of the Revised Code are silent as to the board's ability to control the actions of deputy sheriffs or the sheriff's department. It is thus axiomatic that the board did not and could not control or dictate the manner in which the sheriff's department conduct its activities.

The trial court apparently relied on the following set of determinations to conclude that Deputy Smith was an employee of the board: first, that the terms "Board of Erie County Commissioners" and "Erie County" are synonymous; secondly, that Deputy Smith was an employee of the Erie County Sheriff as well as the county. Therefore, Smith was all employee of the Board of Erie County Commissioners. This court has already ruled that the terms "Erie County" and "Board of Erie County Commissioners" are not the same. The trial court, in determining that the two terms were synonymous, relied on the Supreme Court of Ohio's decision in *Zents* v. *Bd. of Cmmrs.* (1984), 9 Ohio St. 3d 204. That case abolished sovereign immunity as a bar to tort actions against a county. Further, the Supreme Court of Ohio held that a suit against the board of county commissioners was a suit against the county itself for the purposes of sovereign immunity. Nowhere in the language of the court is it stated

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[3] The Lebers argue that the board specifically authorized Deputy Smith's hiring as part of a CETA program. Therefore, the Lebers conclude that Deputy Smith was an employee of the board. This argument is tenuous at best and ignores the risk of control as a factor. We thus find no merit in this assertion.

that the two terms are interchangeable for the purposes of an insurance contract.

It is also significant that the court stated that "*** a county will be held liable, the same as private corporations and persons, for the negligence of its employees and agents in the performance of their activities." *Zents, supra*, at paragraph one of the syllabus. Consequently, the general rules of the doctrine of *respondeat superior* apply to the county as they do to corporations and persons. Considering our prior discussion concerning the right of control, Deputy Smith cannot be said to be an employee of the Board of Erie County Commissioners. Thus, the application of *respondeat superior* was error. Buckeye Union's fifth assignment of error is found well-taken.

The Lebers argue that the issue of *respondeat superior* is *res judicata* to the present appeal, because the question was already decided in *Leber I* and could not be relitigated. This argument relates directly to Buckeye Union's fourth assignment of error.

Buckeye Union's fourth assignment of error asserts that the trial court erred in concluding and instructing the jury that the August 7, 1984 judgment entry was binding on Buckeye Union. That judgment entry was based upon the jury verdict in favor of the Lebers in the *Leber I* lawsuit. In essence, Buckeye Union argues that this application of *res judicata* and collateral estoppel was in error for two reasons; first, that Buckeye Union was not a party to the *Leber I* action and secondly, that it was denied appellate review.

It is well established that in order for a judgment to be *res judicata* in a subsequent action, the parties in the subsequent action must have been adverse parties to the former judgment. *Wright* v. *Schick* (1938), 134 Ohio St. 193. A necessary requirement of due process of law is that a party must have an opportunity to be heard. Furthermore, the Supreme Court of Ohio stated:

> "In our opinion, the existing Ohio requirement that there be an identity of parties or their privies is founded upon the sound principle that all persons are entitled to their day in court. ***" *Whitehead* v. *Genl. Tel. Co.* (1969), 20 Ohio St. 2d 108, 116.

As noted earlier, the plaintiffs to the *Leber I* lawsuit were Eugene Leber and his parents, while the defendants were Deputy Smith, the Sheriff of Erie County and the board. Buckeye Union was not a named defendant. Furthermore, the issue of coverage was never litigated, nor was the issue of *respondeat superior* ever litigated as between either Buckeye Union and the Lebers or Buckeye Union and the board. Consequently, the lower court erred in its application of *res judicata* as against Buckeye Union.

Lastly, because the board settled in *Leber I* and the appeals were ordered dismissed, Buckeye Union was denied access to appellate review. Therefore, this court finds Buckeye Union's fourth assignment of error well-taken.

Pursuant to App. R. 12 (B), this court will now render the judgment that the trial court should have rendered. For the purposes of the insurance contract between Buckeye Union and the board, the terms "Board of Erie County Commissioners" and "Erie County" are not synonymous, and the named insured is the Board of Erie County Commissioners. Further, Deputy Smith is not an employee of the board. As such, there is no coverage under the policy for the negligent training nor negligent conduct of Deputy Smith.

In so ruling, this court finds that Buckeye Union's position as to the issue of coverage was based on a reasonable good faith belief that Deputy Smith was not an employee of the named insured. It thus naturally follows that Buckeye Union did not act in bad faith. As a result, the jury verdict that Buckeye Union had acted so was contrary to the manifest weight of the evidence. Likewise, the awarding of pre-

judgment and post-judgment interest by the trial court was in error. Buckeye Union's tenth, eleventh, and twelfth assignments of error are found well-taken.

In their last assignment of error, Buckeye Union argues that the trial court erred in awarding the Lebers costs and attorney fees under R.C. 309.13. This court has already determined that Buckeye Union did not act in bad faith. Hence, the Lebers have simply not prevailed. It follows that the award of attorneys fees was error. Buckeye Union's thirteenth and last assignment of error is found well-taken.

This court has effectively ruled in favor of Buckeye Union. As such, Buckeye Union's Assignments of Error Nos. III, VI, VII, VIII, and IX are rendered moot, and found not well-taken.

We now turn to that portion of the decision concerning appellees/cross-appellants Lebers assignments of error. They are as follows:

"ASSIGNMENT OF ERROR NO. 1

(Cross-Appeal As To Defendant The Buckeye Union Insurance Company)

"THE TRIAL COURT PREJUDICIALLY ERRED BY DEDUCTING FROM THE VERDICT RENDERED AGAINST THE BUCKEYE UNION INSURANCE COMPANY, WHICH ACTED IN BAD FAITH AND WITH ACTUAL MALICE, THE AMOUNT PAID TO PLAINTIFFS, IN SETTLEMENT, BY THEIR INSURER.

"*ASSIGNMENT OF ERROR NO. 2.*

(As to Defendant Raymond N. Watts)

"THE TRIAL COURT PREJUDICIALLY ERRED BY GRANTING EACH Of FOUR DEFENDANTS THREE PEREMPTORY CHALLENGES WHILE ACCORDING

PLAINTIFFS A TOTAL OF ONLY THREE CHALLENGES AND BY NOT EXCUSING A JUROR WHO HAD SOCIAL RELATIONSHIPS WITH THREE PARTNERS OF DEFENDANT, RAYMOND N. WATTS, AND WHO, DURING THE TRIAL, CONVERSED AND SHOOK HANDS WITH WATTS' DAUGHTER.

"ASSIGNMENT OF ERROR NO. 3

(As To Defendant Raymond N. Watts)

"THE VERDICT AND JUDGMENT IN FAVOR OF DEFENDANT RAYMOND N. WATTS IS CONTRARY TO LAW. THE TRIAL COURT PREJUDICIALLY ERRED BY OVERRULING PLAINTIFFS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AS TO DEFENDANT WATTS AND BY FAILING TO INSTRUCT THE JURY ON THE DOCTRINE OF JOINT ENTERPRISE.

"ASSIGNMENT OF ERROR NO. 4

(As To Defendants Raymond N. Watts and Eastman & Smith)

"WITH RESPECT TO PLAINTIFFS' CLAIMS AGAINST THE ATTORNEYS, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DECLINING TO CHARGE TO JURY, AS REQUESTED BY PLAINTIFFS, ON THE CRITICAL ISSUE OF THE SHIFTING BURDEN OF PROOF ON PLAINTIFFS' BREACH OF FIDUCIARY DUTY CLAIMS.

"ASSIGNMENT OF ERROR NO. 5

(As to Defendants Raymond N. Watts and Eastman & Smith)

"THE TRIAL COURT PREJUDICIALLY ERRED BY UTILIZING MULTIPLE 'VERDICT FOR PLAINTIFFS' FORMS, A FORM FOR EACH DEFENDANT, EACH CONTAINING THE SAME BASE $10,150,000 COMPENSATORY DAMAGES FIGURE. THE FORMS WERE MISLEADING IN THAT THEY LED THE JURY TO BELIEVE THAT IF THEY RETURNED A VERDICT AGAINST MORE THAN ONE DEFENDANT THE JURY WOULD NECESSARILY BE AWARDING PLAINTIFFS A MINIMUM OF $20,300,000 OR $30,450,000.

"ASSIGNMENT OF ERROR NO. 6

(As To Defendants Raymond N. Watts and Eastman & Smith)

"THE TRIAL COURT PREJUDICIALLY ERRED: (1) BY REFUSING TO SUBMIT PLAINTIFFS' EXHIBIT 32, EXCERPTS FROM OHIO'S CODE OF PROFESSIONAL RESPONSIBILITY, TO THE JURY ALONG WITH THE OTHER ADMITTED EXHIBITS; (2) BY REFUSING TO FURNISH THE JURY WITH TRANSCRIPTS OF THE TESTIMONY OF ATTORNEYS WATTS AND JONES, PURSUANT TO THE JURY'S REQUEST; AND (3) BY REFUSING THE JURY'S REQUEST FOR A COPY OF THE COURT'S CHARGE.

"ASSIGNMENT OF ERROR NO. 7 (CONDITIONAL) (As To Defendants Raymond N. Watts and Eastman & Smith)

"IN THE UNLIKELY EVENT THE TRIAL COURT ERRED, AS BUCKEYE ASSERTS IN ITS FIRST ASSIGNMENT OF ERROR, BY NOT SUMMONING A JURY VENIRE FROM AN ADJOINING COUNTY, PURSUANT TO R.C. 2311.42, THEN A NEW TRIAL

OF ALL JURY ISSUES IS MANDATED AS TO ALL DEFENDANTS."

In their first assignment of error, Lebers argue that the trial court erred by deducting $2,000,000 from the jury award rendered against Buckeye Union. In his journal entry of September 4, 1987, the trial judge ruled that Buckeye Union was entitled to a setoff of $2,000,000, that being equal to the settlement amount paid to Lebers by American Home Assurance Company during the second week of trial. Lebers advance various arguments in support of this assignment of error. However, because this court has previously ruled that Buckeye Union had not acted in bad faith in its dealings with the board, the first assignment of error is rendered moot and found not well-taken.

Lebers' next two assignments of error pertain to Raymond Watts, and the judgment on the malpractice claims in favor of Watts.

Lebers' second assignment of error asserts that the lower court erred by granting three peremptory challenges to each of the four defendants (Buckeye, American Home, Raymond Watts, and Eastman & Smith), while affording the Lebers only three peremptory challenges. Additionally, Lebers argue that it was error by the trial court in not excusing one of the jurors who had social contacts with some of the defendants.

Civ. R. 47(B) provides the applicable standard relating to peremptory challenges, and states in pertinent part:

"(B) Challenges to Jury. In addition to challenges for cause provided by law, each party peremptorily may challenge three jurors. If the interests of multiple litigants are essentially the same, 'each party' shall mean 'each side.'

"Peremptory challenges may be exercised after the minimum number of jurors allowed by the rules has been passed for cause and seated on the panel. Peremptory

challenges shall be exercised alternately, with the first challenge exercised by the plaintiff. The failure of a party to exercise a peremptory challenge constitutes a waiver of that challenge. If all parties or both sides, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges."

The Supreme Court of Ohio has reiterated the long-standing rule regarding the number of peremptory challenges in civil cases.

> "'Under statutes which allow a specific number of challenges to 'each party,' the majority view is that those who have identical interests or defenses are to be considered as one party and therefore only collectively entitled to the number of challenges allowed to one party by the statute. *** However, if the interests of the parties defendant are essentially different or antagonistic, each litigant is ordinarily deemed a party within the contemplation of the statute and entitled to the full number of peremptory challenges. ***'" *Lefort* v. *Century 21-Maitland Realty Co.* (1987), 32 Ohio St. 3d 121, 125, quoting from *Chakres* v. *Merchants & Mechanics Federal S. & L. Assn.* (1962), 117 Ohio App. 351, 355.

Based on this interpretation of Civ. R. 47(B), this court cannot find error by the trial court in the case *sub judice* for allowing each defendant three peremptory challenges. All of the defendants were represented by independent counsel, filed separate answers and asserted different defenses. Additionally, "*** the defenses asserted did not necessarily stand or fall together." *Lefort*, *supra*, at 125. See, also, *Chakres, supra*, at 356. Therefore, the trial court was correct in affording each defendant three peremptory challenges.

However, Lebers do not assign this as error. Rather, they argue that since the defendants were accorded three peremptory challenges each, the trial court was obligated to vest the plaintiffs with an equal number.

This court finds no Ohio law addressing this issue, and Lebers concede to this absence of Ohio authority. Instead, Lebers direct this court to cases in other jurisdictions essentially holding that plaintiffs and defendants should be given equal numbers of peremptory challenges to further the interests of justice.

As this court noted earlier, Civ. R. 47(B) controls this area of Ohio law, and makes no mention of such a proposition. Given the dearth of Ohio case law and lack of statutory guidance, this court declines to attach merit to this argument. Regardless of the virtue of the claim, this decision is for higher authority and not within the purview of this court.

Lebers next argue that the trial court prejudicially erred by not excusing a juror who had social contacts with defendant Raymond Watts. The voir dire of prospective jurors is vested within the sound discretion of the trial court. See *Krupp* v. *Poor* (1970), 24 Ohio St. 2d 123. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude was unreasonable, arbitrary or unconscionable." *State* v. *Adams* (1980), 62 Ohio St. 2d 151, 157 (citations omitted). Upon reviewing the record, it is apparent that the juror in question was open and frank, and indicated to the court her ability to be fair and impartial. This court cannot discern any abuse of discretion of the trial court in refusing to excuse the juror. For the reasons stated above, Lebers' second assignment of error is found not well-taken.

In their third assignment of error, Lebers argue that the verdict and judgment in favor of Watts is contrary to law. Further, they assert that the trial court erred in denying their

motion for a judgment notwithstanding the verdict and by failing to give a jury instruction on the doctrine of joint enterprise. To support the first portion of his argument, Lebers provide this court with a lengthy dissertation of the evidence and testimony adduced at trial. For the purposes of this assignment of error, this court construes the argument to be that the jury verdict was against the manifest weight of the evidence.

The landmark case in this area of Ohio law is *C.E. Morris Co.* v. *Foley Construction Co.* (1978), 54 Ohio St. 2d 279. Therein, the Supreme Court of Ohio stated, in the syllabus:

> "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence."

In the case at bar, both sides of the litigation presented to the jury more than enough evidence to support a verdict going either way. In his defense of the malpractice claims, Watts offered expert testimony from various witnesses that his actions were consistent and reasonable. In reviewing the transcript and evidence submitted to the jury, this court finds their verdict is more than adequately supported by the record and will not be overturned.

The next argument advanced by Lebers is that the trial court should have granted their motion for a judgment notwithstanding the verdict on the issues concerning the malpractice claims against Watts. A trial court should properly deny a motion for a judgment notwithstanding the verdict when there is sufficient evidence regarding an issue to permit reasonable minds to reach different conclusions. *O'Day* v. *Webb* (1972), 29 Ohio St. 2d 215. This court finds the record replete with sufficient evidence to enable reasonable minds to come to different conclusions. Lebers' contentions in this regard are without merit.

Lastly, Lebers contend the trial court erred in failing to instruct the jury on the doctrine of joint enterprise. The theory of joint enterprise is an exception to the doctrine of imputed negligence. As stated by the Supreme Court of Ohio in *Bloom* v. *Leech* (1829), 120 Ohio St. 239, at paragraph one of the syllabus:

> "The doctrine of imputed negligence does not ordinarily apply in Ohio, an exception being when parties are engaged in a joint enterprise."

This court finds that the doctrine of imputed negligence and the joint enterprise exception are both inapplicable to the instant case. As such, Lebers have suffered no prejudice by the trial court's refusal to give a jury instruction on joint enterprise. Based on all of the above reasons, Lebers' third assignment of error is found not well-taken.

As their fourth assignment of error, Lebers assert the trial court erred by declining to instruct the jury on the issue of the shifting burden of proof on their breach of fiduciary duty claims. The argument advanced by Lebers is that once a plaintiff (client) establishes a fiduciary relationship and a transaction, the burden of proof shifts to the attorney to prove fulfillment of his/her fiduciary duties.

Breach of a fiduciary duty may constitute malpractice. However, the plaintiff must also prove the existence of an attorney-client relationship, proximate cause and damages. Lebers cite no authority for their proposition that the burden of proof shifts, other than cases involving shareholders/directors fiduciary duties in a corporate setting. Those cases are readily distinguished from legal malpractice claims and are thus inapposite to this case. The burden of proving the elements of legal malpractice do not shift and remain with the plaintiff by a preponderance of the evidence. Lebers' fourth assignment of error is found not well-taken.

In their fifth assignment of error, Lebers attack the trial court's use of verdict forms. They argue that the forms were misleading. Conversely, both Watts and Eastman & Smith contend that the assignment of error is merely speculative and not supported by the record. While this court is prone to agree that the assigned error is speculative, we find that Lebers have suffered no prejudice in the use of the forms submitted to the jury. Lebers' fifth assignment of error is found not well-taken.

For their sixth assignment of error, Lebers submit that the lower court erred by refusing to submit to the jury: (1) relevant sections of the Ohio Code of Professional Responsibility; (2) transcripts of the testimony of attorneys Watts and Jones; and (3) a copy of the court's charge. It is within the discretion of the trial court to determine which documents and exhibits may or may not be sent to the jury room. Upon our review of the record, this court cannot find any abuse of that discretion in the case *sub judice*. The Supreme Court of Ohio has repeatedly held that abuse of discretion is more than an error of law or judgment; it suggests an unreasonable or arbitrary attitude on the part of the trial court. See *Huffman* v. *Hair Surgeon, Inc.* (1985), 19 Ohio St. 3d 83, 87. Therefore, Lebers' sixth assignment of error is found not well-taken.

As their seventh and last assignment of error, Lebers condition their argument upon this court's ruling as to Buckeye Union's first assignment of error, concerning the jury venire. Having already determined that the lower court did not err in the jury venire process, Lebers' assigned error is rendered moot. It is therefore found not well-taken.

This court now comes to that portion of the case *sub judice* relating to the cross-appeals of both Raymond Watts and Eastman & Smith. Raymond Watts asserts the following assignments of error:

"1. The trial court erred when it failed to grant Raymond N. Watts' summary judgment or a directed verdict insofar as the malpractice claim was barred by the statute of limitations.

"2. The trial court erred by not granting Raymond N. Watts' summary judgment or a directed verdict insofar as the Board of County Commissioners assignment of the malpractice claim to the Lebers resulted in the extinguishment of said malpractice claim.

"3. The trial court erred by not granting Raymond N. Watts summary judgment or a directed verdict insofar as there was insufficient evidence that the alleged malpractice was the proximate cause of plaintiffs' damages.

"4. The trial court erred when it decided the motions in limine and jury instructions insofar as the measure of damages for the malpractice claim should not have been set at a minimum of $10.15 million.

"5. The trial court erred when it advised and instructed the jury of the details of its ruling on the declaratory [*sic*] judgment action."

By virtue of the rulings and decisions of this court as stated above, we have in effect affirmed that portion of the jury verdict rendered in favor of Raymond Watts. Consequently, the errors assigned by Mr. Watts and his arguments in support thereof are rendered moot. Thus, the assignments of error are found not well-taken.

A similar situation exists as to cross-appellant Eastman & Smith, who asserts the following assignments of error:

"1. THE TRIAL COURT ERRED IN NOT DIRECTING A VERDICT IN EASTMAN & SMITH'S FAVOR AT THE CONCLUSION OF THE EVIDENCE.

"2. THE TRIAL COURT ERRED IN HOLDING THAT THE THRESHOLD MEASURE OF PLAINTIFFS' DAMAGES ON THEIR CLAIMS FOR LEGAL MALPRACTICE WAS THE UNDERLYING JUDGMENT FOR $10,150,000."

Having already determined the issues on appeal in favor of Eastman & Smith, their assignments of error on cross-appeal are now moot, and therefore found not well-taken.

Upon consideration whereof, this court finds substantial justice has not been done as to appellant Buckeye Union, and the judgment of the Erie County Court of Common Pleas is hereby reversed. Pursuant to App. R. 12(C), this court will now render the judgment the trial court should have rendered. For the purposes of the insurance policy between Buckeye Union and the Board of Erie County Commissioners, the named insured is the Board of Erie County Commissioners. Furthermore, neither Deputy Smith nor the Sheriff of Erie County are employees of the Board of Erie County Commissioners. As such, the insurance contract does not provide coverage for the negligence of Deputy Smith or the Sheriff of Erie County. Thus, Buckeye Union acted upon a reasonable good faith belief that negates the allegations of bad faith. This court also finds that substantial justice has been done as to appellees/cross-appellants Lebers; and that substantial justice has been done as to both Eastman & Smith and Raymond Watts. The judgment of the Erie County Court of Common Pleas is hereby reversed, in part, and affirmed, in part. It is ordered that appellees/cross-appellants Lebers pay the court costs of this appeal.

JUDGMENT REVERSED, IN PART, AND AFFIRMED, IN PART.

HANDWORK, P.J., and GLASSER, J., concur.

IN THE COURT OF APPEALS OF ERIE COUNTY

Eugene A. Leber, et al.
APPELLEES/
CROSS-APPELLANTS

v.

Steven A. Smith, etc., et al.
(Buckeye Union Ins. Co.)
APPELLANTS/
CROSS-APPELLEES

COURT OF APPEALS
NO. E-87-43

TRIAL COURT NO. 45270

JOURNAL ENTRY

DATE March 3, 1989

Finding appellant/cross-appellee Buckeye Union's Assignments of Error Nos. 1, 3, 6, 7, 8, and 9 not well-taken, and Assignments of Error Nos. 2, 4, 5, 10, 11, 12, and 13 well-taken; all of appellees/cross-appellants Lebers' assignments of error not well-taken; all of cross-appellant Watts' assignments of error not well-taken and both of cross-appellant Eastman & Smith's assignments of error not well-taken, judgment of the Erie County Court of Common Pleas is reversed as to appellant/cross-appellee Buckeye Union. Pursuant to App. R. 12(C), this court renders the judgment the trial court should have rendered. For the purposes of the insurance policy between Buckeye Union and the Board of Erie County Commissioners, the named insured is the Board of Erie County Commissioners. Furthermore, neither Deputy Smith nor the Sheriff of Erie County are employees of the Board of Erie County Commissioners. As such, the insurance contract does not provide coverage for the negligence of Deputy Smith or Sheriff of Erie County. Thus, Buckeye Union acted upon a reasonable good faith belief that negates the allegations of bad faith. This court also finds that substantial justice has been done as to appellees/cross-appellants Lebers; and that substantial justice has been done as to both Eastman & Smith and Raymond Watts. The judgment of the Erie County Court

of Common Pleas is hereby reversed, in part, and affirmed, in part. It is ordered that appellees/cross-appellants Lebers pay the court costs of this appeal. See Opinion by Connors, J., on file.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

Peter M. Handwork, P.J. _____
PRESIDING JUDGE

John J. Connors, Jr., J. _____
JUDGE

George M. Glasser, J. _____
CONCUR. JUDGE

APPENDIX L

STATE OF OHIO	)	IN THE COURT OF
	) ss:	COMMON PLEAS
	)	CONSOLIDATED
COUNTY OF ERIE	)	CASE NO. 45270

JUDGE GEORGE J. McMONAGLE

Eugene A. Leber, et al., Plaintiffs,	)	
vs.	)	
	)	*JUDGMENT ENTRY*
THE BUCKEYE UNION INSURANCE COMPANY, et al. Defendants.	)	(on Jury Verdict)

This matter came on for trial, the Honorable George J. McMonagle presiding, on the 29th day of June, 1987. A jury, having been duly impaneled and having heard the trial testimony, closing arguments, and the instructions of the Court, found in accordance with the general verdict forms and the interrogatories which were submitted to them and which are expressly incorporated herein by reference. The verdicts and interrogatories were returned on August 13, 1987, and have been filed with the Clerk of the Common Pleas Court of Erie County, Ohio. The Court, coming on to enter judgment on the verdicts and answers of the jury in accordance with the general verdict forms and the interrogatories, the law, and all of the proceedings had herein, accordingly, ADJUDGES, ORDERS and DECREES as follows:

1. Judgment is rendered in favor of the plaintiffs and against defendant The Buckeye Union Insurance Company in

the amount of Thirteen Million Three Hundred Thirty-six Thousand Two Hundred Thirty-two and 80/100 Dollars ($13,336,232.80). The components of this amount are the judgment entered in this case on August 7, 1984, as well as interest at ten (10%) percent per annum to date hereof, Three Million Sixty-four Thousand Four Hundred Sixty-five and 74/100 Dollars ($3,064,465.74). It also includes pre-judgment interest of Two Million One Hundred Twenty-one Thousand Seven Hundred Sixty-seven and 06/100 Dollars ($2,121,767.06) ten (10%) percent interest from July 5, 1982, to August 7, 1984. The total includes the amount entered in judgment by this Court on August 10, 1987, and is after deducting the $2,000,000.00 set off referred to in paragraph three hereof.

2. The Court expressly determines, based upon all the evidence and upon the applicable law, that The Buckeye Union Insurance Company is obligated to the plaintiffs for pre-judgment interest, which is hereby awarded in favor of plaintiffs in the sum of Two Million One Hundred Twenty-one Thousand Seven Hundred Sixty-seven and 06/100 Dollars ($2,121,767.06).

3. The Court finds that the defendant, The Buckeye Union Insurance Company, is entitled to a set off in the amount of Two Million Dollars ($2,000,000.00) against the verdict heretofore rendered herein; that sum being the amount paid to the plaintiffs by the American Home Assurance Company on a covenant prior to the return of the verdict rendered herein by the jury.

4. Judgment is rendered in favor of defendant, Eastman & Smith and against the plaintiffs, Lebers, Board of Erie County Commissioners, and Erie County, as to all causes of action asserted herein.

5. Judgment is rendered in favor of defendant Raymond N. Watts and against the plaintiffs, Lebers, Board of Erie

County Commissioners, and Erie County, as to all causes of action asserted herein.

6. Costs are hereby taxed to defendant, The Buckeye Union Insurance Company, in an amount, including reasonable attorney fees pursuant to Ohio Revised Code Section 309.13, to be determined and computed after any appeals.

7. There is no just reason for delay.

JUDGE GEORGE J. McMONAGLE

Sept. 3, 1987